Ontario
Energy
Board

In the matter of
a hearing under the
Ontario Energy Board Act
regarding
Awarding of Costs
and
Related Procedural Matters

E.B.O. 116

REPORT OF THE BOARD

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E.B.O. 116

IN THE MATTER OF the Ontario Energy Board Act, R.S.O. 1980, c. 332, as amended;

AND IN THE MATTER OF a hearing regarding Awarding of Costs and Related Procedural Matters.

BEFORE: Marie C. Rounding
Presiding Member

Robert W. Macaulay, Q.C.
Chairman

Ian C. MacNabb
Vice-Chairman

John C. Butler
Member (now Vice-Chairman)

Harvey R. Chatterson
Member

Donald H. Thornton, Q.C.
Member

Richard R. Perdue, Q.C.
Member

Denis A. Dean
Member

John D. McFadyen
Member

June 12, 1985


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GLOSSARY OF ABBREVIATIONS AND DEFINITIONS

AMPCO	Association of Major Power Consumers in Ontario.
APPLICANT UTILITY	Refers to a transmitter, distributor or storage company that makes application to the Ontario Energy Board and for the purposes of this Report also refers to Ontario Hydro.
APUB	Alberta Public Utilities Board.
CAC	Consumers' Association of Canada (Ontario).
CELA	Canadian Environmental Law Association.
CFB	Consumers Fight Back.
CONSUMERS'	The Consumers' Gas Company Ltd.
COSTS IN ADVANCE	An award of costs to an intervenor prior to a hearing and prior to expenditures being incurred.

CRTC	Canadian Radio-Television and Telecommunications Commission.
FONOM	Federation of Northern Ontario Municipalities.
FUNDING	A lump sum payment of funds to an intervenor prior to a hearing, which is not related to an intervenor's performance at the proceedings and is in the nature of a grant.
HYDRO	Ontario Hydro.
HAMILTON EXPRESSWAY CASE	File No. CH-82-08 - October 16, 1984 Order and Reasons for Decision of the Joint Board. In the Matter of an Undertaking of the Regional Municipality of Hamilton-Wentworth to develop and construct the Mountain East-West and North-South Transportation Corridor to connect Highway 403 in Ancaster to the Queen Elizabeth Way in the eastern portion of the City of Hamilton.

IGUA	Industrial Gas Users Association.
INTER-CITY	Inter-City Gas Corporation - Ontario Operations.
INTERIM COSTS	A contingent award of costs made to an intervenor at any time after the filing of an application with the Ontario Energy Board, but before the delivery of the final decision by the Board, such award to be used only for fees, counsel fees and expenses and under the supervision and control of the Board.
KITCHENER	City of Kitchener.
NDP	New Democratic Party Caucus.
NORTHERN	Northern and Central Gas Corporation Limited.
NO TOWERS	No Towers Federation.
OEB ACT	The Ontario Energy Board Act, R.S.O. 1980, Chapter 332.

OMEA	Ontario Municipal Electric Association.
ONGA	Ontario Natural Gas Association.
UNION	Union Gas Limited.
UNION HALL	Union Hall Action Committee.

CHAPTER I - INTRODUCTION

Since its creation in 1960 the Ontario Energy Board ("OEB" or the "Board") has been responsible for the regulation of natural gas rates, gas pipeline construction and related environmental matters, as well as a number of other energy-related concerns. The Board's mandate was enlarged in 1974 to include hearings upon a reference from the Minister of Energy to deal with Ontario Hydro proposed rate increases and related matters, particularly with regard to Hydro's bulk power (wholesale) rates. The Board is required to report its findings and recommendations to the Minister of Energy. All these matters are the subject of public hearings in which the participants have generally borne their own costs.

The OEB, in the interests of encouraging public participation in its hearings, has found it timely to determine whether it is appropriate for participants generally to continue

to bear their own costs, or whether a process should be made available whereby some or all of those costs could be recovered.

Accordingly, the following notice was published in the August 29, 1984 editions of 43 Ontario daily newspapers.

NOTICE OF PUBLIC HEARING
UNDER THE ONTARIO ENERGY BOARD ACT
R.S.O. 1980, CHAPTER 332

REGARDING AWARDING OF COSTS
AND RELATED PROCEDURAL MATTERS

The Hearing

A public hearing will commence at 9:00 a.m. on **Tuesday, November 20, 1984,** in the Ontario Room, 2nd floor, MacDonald Block, 900 Bay Street, Toronto. The hearing is expected to last 2 to 3 days.

Purpose of the Hearing

To assist the Board in determining whether its current practices regarding awarding of costs and related procedures are adequate, having regard to its rules, its particular statutory responsibilities, and the practices of other tribunals with comparable functions.

Participation in the Hearing

The Board invites individuals, citizens' groups, associations, companies and others who may be interested in the issue of the Board

awarding costs and related procedures, to participate in the hearing.

How to Participate

If you wish to participate, please so indicate by writing a letter to the Board Secretary at the address below **not later than September 21, 1984.** Since the hearing is intended to be informal, your letter need not be in any special form, but should set out your name, address and telephone number and a brief statement of your intention to participate.

When all letters have been received, the Board will prepare a mailing list which will be sent to all participants along with other relevant information not later than September 28, 1984. Each participant will then be required to prepare a brief and send a copy of it to the Board and everyone on the list **not later than October 26, 1984.**

Preparation of Briefs

All briefs must be typed double-spaced and should set out your comments on the current practices of the Board regarding the awarding of costs and related procedures. If a brief is submitted on behalf of a citizens' group, association, company, etc. please make sure that it contains the name, address and telephone number of a contact person.

Preparing for the Hearing

All participants are invited to attend or be represented at the entire hearing. However, if this is not possible and you wish to make an oral presentation, arrangements will be made by the Board Secretary for scheduling a mutually convenient time.

Since all briefs will have been studied by the Board and all participants beforehand, reading of them at the hearing will not be necessary. Participants are not required to make oral presentations. However, those who wish to do so, will be encouraged to discuss matters contained in other briefs as well as their own.

If, as a result of presentations by others, you feel that your initial brief requires further support or modification, then you are encouraged to make a final written submission following the hearing.

Important Deadlines

So that everyone will have adequate opportunity to participate in the hearing, it is necessary to establish certain deadlines for the filing of material. The Board expects all participants to co-operate with the following time schedule.

Letters to Board indicating intention to participate	- September 21, 1984
Distribution by Board of list of participants and other material	- September 28, 1984
Briefs to Board and all other participants	- October 26, 1984
Commencement of public hearing	- November 20, 1984
Final written submissions (optional)	- December 4, 1984

Further Information

For further information regarding the hearing, please contact the Board Secretary,

Mr. Stanley Thomas, 9th Floor, 14 Carlton Street, Toronto, Ontario M5B 1J2; telephone (416) 598-4000. The Board accepts collect calls.

DATED at Toronto this 27th day of August, 1984

ONTARIO ENERGY BOARD

Robert W. Macaulay, Q.C.
Chairman

Personal notice was also sent by ordinary mail to all those who had participated in Board hearings during the previous ten years.

Twenty-five letters of intention to participate in the hearing were received by September 21, 1984. A list of the respondents, set out in Appendix A, was distributed by the Board to each respondent on September 28, 1984. A list of possible issues, as set out below, and a suggested bibliography of costs articles and jurisprudence set out in Appendix B, were included in this distribution.

The list of possible issues was provided by the Board to assist participants in

considering common issues which could be examined at the hearing. These issues were suggestions only and no one was confined to this list. However, many of the participants found it convenient to arrange their submissions so that each of these issues was addressed. The Board also accepted this arrangement in its Conclusions. The list of issues as originally distributed to the respondents is as follows:

LIST OF POSSIBLE ISSUES

1. For what reasons should costs be awarded to intervenors: e.g. need? deterrence to loser? cost recovery? reward? recognition of a contribution?
2. In what kinds of proceedings should costs be awarded?
3. Who should be eligible/ineligible for cost awards?
4. For what kinds of expenses should costs be awarded?

5. Who should pay costs and under what circumstances?
6. Should the applicant's costs be treated the same as, or different from, intervenors' costs?
7. Should interim cost awards be made (i.e. costs awarded before and during the hearing) and, if so, subject to what conditions?
8. Should costs be determined in accordance with a fixed scale (tariff), subject to individual determination in each case (taxation), some combination of both, or some other alternative?
9. Who should decide to whom costs are awarded: the panel hearing an application? other Board Members? Board staff? persons not connected with the Board?
10. Who should bear the burden of showing that costs should or should not be awarded in a particular case?

11. What safeguards may be necessary to avoid cost awards being wasted, either by applicants or by intervenors?
12. What procedures should be used to enable the Board to decide costs questions efficiently but fairly?

The suggested bibliography was compiled to assist participants, but it was not meant to be all-inclusive, nor was it required reading. Copies of the relevant excerpts of these publications were made available for reference in the Board reading room.

The Board received twenty-two submissions by October 26, 1984 and a list of participants who submitted briefs is set out in Appendix C. Three of the original respondents, INCO Limited, Cyanamid Canada Inc. and the Ontario Federation of Agriculture decided not to submit briefs. INCO and Cyanamid are both members of IGUA and AMPCO and were satisfied that these associations would represent their interests adequately.

Eighteen of the twenty-two persons who submitted briefs participated at the hearing. The Ontario Municipal Electric Association, Inter-City Gas Corporation, Union Hall Action Committee and No Towers Federation did not attend the hearing. A list of the participants in order of appearance at the hearing is shown in Appendix D.

The hearing continued for two full days, November 20 and 21, 1984.

This hearing was not intended to determine any specific question concerning the rates of a public utility, but rather, to deal with policy options that could be applied in the future to the Board's statutory discretion to award costs. For this reason the hearing was not delegated to a small panel of Board Members; instead, all the Members of the Board sat as a panel because of the broad policy issues involved. Since the hearing, two of the Board Members who participated have resigned from the Board and as a result, the Report has been

signed only by the remaining Board Members who sat on the panel.

The hearing procedure was less formal than usual because of its non-adversarial nature. The persons representing each participant appeared as a delegation and were allowed, but not required, to speak to their briefs for up to 30 minutes. Each delegation was then questioned for clarification by the Board's Special Counsel and then by various Board Members. There was no cross-examination.

Mr. Andrew Roman was retained as Special Counsel to assist the Board in exploring issues that were perceived to be in the public interest. He was not called upon to make a submission or final argument to support or oppose any positions taken by the participants.

Final written submissions, although entirely optional, were invited by December 4, 1984 to provide an opportunity for any participant to respond to the oral submissions of others. Final submissions were filed by North

York Hydro, Mr. J.A. Giffen, OMEA, FONOM, and Consumers'.

Inevitably, there was a degree of overlap in the issues and in the responses to them. There was also some apparent confusion as to what was intended in some issues such as Issue 6 which dealt with the treatment of applicants' and intervenors' costs. The Board has dealt with these matters in its Conclusions.

The Report of the Board has been divided into four chapters, the first of which is this Introduction.

Chapter II summarizes both the past practices of the Board in exercising its costs discretion and the cost award procedures of such administrative tribunals as have been brought to the attention of the Board by participants.

Chapter III summarizes the submissions made by any of the participants on each of the twelve issues. Each summary is comprised of those submissions made in the original briefs,

those made verbally at the hearing and those made in the final written submissions. Not all participants addressed each of the twelve issues.

Chapter IV consists of the conclusions of the Board on each of the twelve issues and indicates the practices and procedures which the Board will adopt to assist it in the exercise of its discretion to award costs under section 28 of the OEB Act.

CHAPTER II - GENERAL OVERVIEW

REVIEW OF PAST COST AWARDS BY THE ONTARIO ENERGY BOARD

The Board's authority to award costs is found in section 28 of the OEB Act which states:

> "28. (1) The costs of and incidental to any proceeding before the Board are in its discretion and may be fixed in any case at a sum certain or may be taxed.
>
> (2) The Board may order by whom and to whom any costs are to be paid and by whom they are to be taxed and allowed.
>
> (3) The Board may prescribe a scale under which such costs shall be taxed.
>
> (4) In this section, the costs may include the costs of the Board, regard being had to the time and expenses of the Board."

In the past, the Board has generally awarded costs under s.28 only in "special" or "extraordinary" circumstances. However, after a lengthy and complex Phase II gas rate application hearing of Northern (Reasons for Decision, E.B.R.O. 314-II, November 1977), the Board stated that it would award costs in that proceeding to respondents:

> "1. who seek them;
> 2. who have a substantial interest in the outcome of the proceedings;
> 3. who have participated in a responsible way; and
> 4. who have contributed to a better understanding of the issues by the Board."

In making this award of costs the Board did not use the words "special" or "extraordinary" but differentiated between this and previous hearings by stating that:

> "It now finds that in the circumstances of these proceedings it is appropriate that it relax, to some extent, its self-imposed restraint and award costs on a more comprehensive basis ... This Phase II hearing covered 56 days and in excess of 6,000 pages of transcript. Some 15 different cost allocation studies were examined. Much of the evidence adduced represented the opinions of expert witnesses. Through their cross-examining and the giving of the evidence by their own expert witnesses, the Respondents gave a broad spectrum of opinions. In this way alternate points of view were more thoroughly presented for the consideration of the Board."

Subsequently the Board, in Phase I of a Union rate application (Reasons for Decision E.B.R.O. 367-I, July, 1978), found that a case

had not been made for an award of costs to intervenors in that proceeding as the nature and extent of intervenors' participation in the proceedings and their ability to take care of their own costs were different from that in E.B.R.O. 314-II.

In the next main rate application of Northern (Reasons for Decision E.B.R.O. 364-I, February, 1979), the Board denied intervenors' requests for costs on the basis that the proceedings were not "unusual". However, in its Reasons for Decision dated April 27, 1979 following Northern's motion for directions (E.B.R.O. 364-II-A) to be relieved of the necessity of producing certain studies, the Board found that the proceedings associated with the motion were "extraordinary" and awarded costs to intervenors. Where costs have been awarded in extraordinary circumstances, such as in E.B.R.O. 364-II-A, they have tended to be in the nature of punitive awards to reimburse parties for the unnecessary expenditure of time and money.

A more recent example of a punitive award of costs occurred in the Consumers' main rate application in E.B.R.O. 386-I (January, 1983). IGUA had commissioned expert evidence with respect to deferred taxes before Consumers' withdrew its claim for recovery thereof and costs were awarded to reimburse IGUA for this expense. The Board did not indicate whether it found the circumstances to be extraordinary, but noted that a lack of good judgement was displayed.

It is apparent from the above that the criteria laid down by the Board in E.B.R.O. 314-II were not followed by the Board in other rate cases and seemed to be no longer applicable unless it could be said that a case was "unusual" or "extraordinary". No definition was given in decisions of "unusual" or "extraordinary".

The Board took a different approach to the awarding of costs in a hearing regarding the Bentpath Pool Landowners. In the E.B.O. 64(1)

and (2) decision in July 1982, the concept of awarding costs to the successful party was applied.

Of the landowners who appeared before it in that proceeding, the Board determined that only four were entitled to status before the Board and entitled to costs as the successful applicants. Three of these four landowners were represented by the same counsel. The four applicants were awarded the costs involved in the determination of their status before the Board, whereas the costs of the unsuccessful applicants were denied. The full costs associated with determining the level of compensation in respect of gas storage rights were awarded, since these would have been incurred even had there been only one applicant with status.

In that same decision, the Board also noted that another counsel did not make any contribution to a better understanding of the issues before the Board and restricted that

landowner's entitlement to costs to certain specific costs.

The Board has approached cost awards in Hydro hearings somewhat differently from the gas rate hearings. The Board has been faced with requests for costs in almost every Hydro rate hearing since 1974, when it first declined to award costs on the basis that:

> "the funding of public interest groups engaging in the public participation process is a matter to be determined by broad Government policy" (H.R. 2, August, 1974).

The Board has maintained this position in all subsequent Hydro rate hearings.

The Board has also differentiated between rate hearings and generic proceedings, indicating that rate hearings are "typically an adversary proceeding" (July, 1977, Reasons for Decision, H.R. 5-I-A). In this hearing into the Electricity Costing and Pricing Study, the Board did award costs for Phase I on the basis that:

> "the Board considers this hearing to be an inquiry into principles and it agrees ... that, overall, interventions in such a hearing are not necessarily self-serving to a particular group or class of customer ... In the opinion of the Board, views of Ontario Hydro's customers and the public in general must be considered. To this end it is important to encourage active, informed and useful participation so that a wide range of views can be examined in detail."

The Board also awarded costs for the balance of the H.R. 5 proceedings in its December, 1979 Report by applying the criteria which had been laid down in E.B.R.O. 314-II, which had taken place after the H.R. 5 Phase I proceedings. This seems to be the only instance in which the E.B.R.O. 314-II eligibility criteria have been applied and followed prior to the Board's present review of its practices.

COST AWARD PRINCIPLES IN OTHER JURISDICTIONS

In making submissions to the Board on the Awarding of Costs to Intervenors and Related Procedural Matters, several participants made reference to the cost award criteria and

practices of other administrative boards in this and other jurisdictions. The Board has found the experience of these tribunals to be of assistance and has taken it into account in reaching its conclusions. The following is an overview of the cost award practices of other administrative tribunals that were mentioned in the submissions of participants or referred to in the suggested bibliography.

Canadian Radio-Television and Telecommunications Commission

The CRTC's authority to award costs is found in section 73 of the National Transportation Act and is similar to that of the OEB. The CRTC Telecommunications Rules of Procedure, which were issued in July 1979, provide for awards of costs to responsible and helpful intervenors, payable by the applicant regulated company and treated as an allowable expense for the company.

The test governing whether an intervenor is eligible for costs is described in section 44(1) of these Rules of Procedure:

> "In any proceeding under this Part, the Commission may award costs to be paid by the regulated company to any intervenor who:
>
> a) has, or is representative of a group or class of subscribers that has, an interest in the outcome of the proceeding of such a nature that the intervenor or group or class of subscribers will receive a benefit or suffer a detriment as a result of the order or decision resulting from the proceeding;
>
> b) has participated in a responsible way; and
>
> c) has contributed to a better understanding of the issues by the Commission."

Section 45 of the Rules of Procedure provides for intervenors to apply in certain circumstances to the Commission for interim costs. Any interim costs may be reviewed and potentially supplemented at the close of the hearing.

The CRTC's rationale for adopting a procedure with respect to costs was stated as being that the award of costs would be an appropriate means for the Commission to: achieve the objective of informed participation in public hearings; contribute to a more effective representation of subscriber interests; and lead to an improved record on which to base decisions.

The CRTC appears to be the only federal regulatory agency that awards costs to intervenors.

British Columbia Utilities Commission

Until May, 1984, the British Columbia Utilities Commission had a cost award power similar to the OEB. However, at that time the British Columbia Utilities Commission Act was amended so that the previous provision was repealed and replaced by the following:

"s.133

1) The Commission may order that the costs of the Commission

incidental to a proceeding before it are to be paid by one or more participants in the proceeding in such amounts and proportions as the Commission may determine;

2) The Commission shall not order that the costs of a participant in a proceeding be paid by another participant and the Commission shall not pay the costs of a participant in a proceeding;

3) In this section "costs of the Commission" includes costs incurred by the Commission for the services of consultants and experts engaged in connection with the proceeding."

Alberta Public Utilities Board

The Alberta Public Utilities Board was the first Canadian regulatory agency to award costs to intervenors. The APUB's statutory authority to award costs under the Alberta Public Utilities Board Act is virtually identical to that of the OEB. In 1971, the Alberta government set up a loans program whereby intervenors could borrow money to finance an intervention and then pay it off when costs were awarded.

In 1975, the APUB released "Guidelines - Rate Hearing Costs" followed by the February, 1977 release of its Position Paper entitled "Interventions and Costs". This paper was intended to replace all previous guidelines with respect to costs. In it, the APUB recognized the importance of having "an aggressive, intelligent and informed intervention". However, later in the paper, the APUB stated that "there may be merit in a curtailment of the number of parties who can expect their costs to be passed on to the customers" and expressed a preference that municipal interventions and public interest groups receive funding from other sources.

The APUB then added that:

> "The Board notes with approval that many of the interventions by large industrial customers have not resulted in claims for reimbursement of costs via the rates. It assumes that these intervenors are particularly aware that their interventions are directed solely to benefits which will flow specifically to themselves or to the rate group to which they belong, and for this reason have not seen fit to ask the customers at large to finance them.

> In this context, however, it should be noted that when a particular customer or group of customers comes before the Board and conducts an intervention directed not only to its own particular rates, but also to the general problems of rate base, fair return, revenue requirement and rate design, and if the Board considers that such interventions are beneficial to all of the customers of the utility, the Board may award costs to be assessed against all of the customers of the utility."

The APUB concluded by stating its current policy:

> "However, the Board must recognize conditions as they currently exist. While it may prefer to see municipal interventions paid for by municipal taxpayers; while it may prefer to see "public interest" groups funded by the public; and while it may question the effectiveness of particular interventions; it cannot attempt to impose upon its Members guidelines which would override their unfettered judicial discretion. The position of the Board is that costs will continue to be awarded to intervenors appearing before it, but that such costs will be scrutinized as to the reasonableness and necessity of the time spent and the fees and expenses charged, and as to the benefits derived by all customers of the applicant.

In other words:

> Costs will be awarded against an applicant and allowed to be recovered from customers through the rates only if the interventions have been effective in testing the applicant's case to the benefit of all customers and such costs have been reasonably and necessarily incurred."

The APUB has subsequently clarified the meaning of this policy in several decisions. In a 1981 decision on Alberta Government Telephones Phase I Costs (E81004), the APUB stated that "any interventions which effectively and responsibly challenge the applicant can be said to have an effect which may accrue to the benefit of all customers".

In a 1984 decision on a rate application of Northwestern Utilities Limited (E84061), the APUB indicated that it:

> "considers that to be "to the benefit of all customers" does not mean that an intervenor need deal with all issues involved in the proceeding but does mean that the intervention should be such, that on a "general principle basis" as opposed to a narrow "self-interest basis", the results of the intervention are generally

> to the benefit of all customers and not just the intervenor himself or a narrow group that he may represent."

The APUB guidelines for rate hearing costs set out the specific information required and the procedure for submitting an application for intervenor's costs.

Alberta Energy Resources Conservation Board

In 1978, the Alberta Legislature amended the Energy Resources Conservation Act and enacted the Local Intervenors' Cost Regulation to permit persons whose land might be directly and adversely affected by proposed energy projects to be reimbursed for reasonable costs directly and necessarily related to the preparation and presentation of an intervention in Energy Resources Conservation Board proceedings. In 1981 the definition of "local intervenor" was amended to read:

> "person, group or association who in the opinion of the Board has an interest in or is in actual occupation of or is entitled to occupy

> land that is or may be directly and adversely affected by a decision of the Board..."

In 1982 the Local Intervenors' Costs Regulation was also revised and Guidelines were developed to assist local intervenors who wished to apply for an award of costs. The Guidelines and Regulation were intended to provide additional policy direction and a reasonable degree of certainty as to what costs would be paid and what procedures were to be followed.

For example, the Costs Regulation provides that the Conservation Board may deny costs, in whole or in part, to otherwise eligible intervenors:

> "s.5(c) if the Board is not satisfied that the costs were reasonable and directly and necessarily related to the proceeding;
>
> (d) if the Board is not satisfied that the local intervenor was in need of legal or technical assistance in the preparation and presentation of his intervention;

(e) if the Board is not satisfied that the intervention was conducted economically;

(f) if, in the opinion of the Board,

i) the intervention and its presentation was unnecessary, irrelevant, improper or intended to delay the proceeding before the Board, or

ii) the claim is excessive, having regard to the nature of the proceeding and the intervention."

Section 31 of the Energy Resources Conservation Act also specifically allows the Conservation Board to make an advance award of costs and to direct any terms and conditions for the payment or repayment of the advance by any party to the proceeding.

Public Utilities Board of Manitoba

The statutory authority of the Manitoba Public Utilities Board to award costs is similar to that of the OEB. Following a public meeting in January 1984, the Public Utilities

Board of Manitoba adopted guidelines and procedures in April 1984 respecting the awarding of costs to intervenors. The Manitoba Board concluded that some provision was necessary to accommodate intervenors' requests for cost awards and such provision would mean that:

> "the consumer representatives will be better informed, and therefore will be able to test an applicant's case and provide the Board with their analysis of the issues and their recommendation."

Four criteria were established as the principal factors in determining whether costs should be awarded. These criteria are:

> "1. Has the Intervenor made a substantial contribution to the proceedings and contributed to a better understanding of the issues before the Board?
>
> 2. Has the Intervenor participated in the hearing in a responsible manner and cooperated with other Intervenors who have a common objective in the outcome of the proceedings in order to avoid duplication of intervention?

3. Has the Intervenor sufficient financial resources to present the case adequately?

4. Does the Intervenor have a substantial interest in the outcome of the proceedings or represent the interests of a substantial number or class of utility customers?"

The Manitoba Board also stated that costs would only be awarded at the conclusion of a hearing, and would normally be charged to the applicant utility, who in turn would recover its costs from its customers. Only costs reasonably and necessarily incurred would be reimbursed.

The Manitoba Board also indicated that it would not at that time consider an award of costs to municipalities or in instances where financial assistance had been provided from another source.

The procedures that were also formally adopted included a provision for pre-hearing meetings so that intervenors could take steps to avoid duplication of effort.

OTHER ONTARIO COST AWARDS PRINCIPLES

Ontario Consolidated Hearings Act Joint Board

The Consolidated Hearings Act of Ontario was passed in 1981 for the purpose of avoiding repetitive, expensive, and time-consuming hearings on undertakings governed by a number of Ontario statutes appended as a Schedule to that Act. The Joint Board, consisting of members of the Environmental Assessment Board and the Ontario Municipal Board, has been given a cost award power comparable to that of the OEB.

The Joint Board in the Ontario Hydro Southwestern Ontario Transmission System Expansion Plan Stage hearing spelled out its primary eligibility criterion (interim order December 16, 1981, CH-81-04) as follows:

> "In order to determine whether an award of costs is appropriate in any particular hearing it is, in our view, necessary to examine whether a particular party has assisted or promoted the objectives of the joint board. Those objectives define the responsibility of the joint board to provide a fair hearing in an efficient and expeditious manner which will result in a final determination

of all relevant issues wherein the joint board gives written reasons for that determination."

The Joint Board then set out specific criteria:

"It may be helpful to the parties to have some criteria enunciated by which the joint board would examine and come to any conclusion regarding an award of costs. We have attempted to set down a number of criteria. It is by no means an exclusive or exhaustive list, for the courts have held that while it is proper for an administrative tribunal to have policy for its own guidance it must not follow that policy slavishly. Each application must be considered on its own merits. Considering the nature of the undertaking as described to us, the following criteria are set out which we believe will be helpful to the joint board in achieving its objective as described earlier.

1. The characteristics of the proponent.

2. Whether there is a clear ascertainable interest to be represented and a specific purpose for the assistance.

3. Whether a separate and adequate representation of a particular interest assisted and substantially contributed to the hearing.

4. Whether there is a need.

5. Whether there was demonstrated a delineated purpose for the expenditure of funds.

6. Accountability for the expenditure.

7. Whether there has been a co-ordinated effort to bring a number of interests within one representative group; whether the particular interest has established a record of concern and a demonstrated commitment in a responsible way to that concern.

8. Whether there has been a better understanding of issues.

9. Whether the costs address an economic imbalance among the parties."

To date, the Joint Board has utilized these and related criteria in making a number of cost awards to intervenors, including a municipal government.

In October 1984 in the Hamilton Expressway Case, the Joint Board made an award of costs to an intervenor in advance of the hearing. The Joint Board's decision was appealed by way of

an application for judicial review in the Divisional Court, which raised the issue of whether the Joint Board has jurisdiction to award costs in advance. The application was heard in mid-April 1985 at the same time as the OEB's stated case which is referred to in Issue 7 of this Report. The matter is still before the Court.

Ontario Municipal Board

The Ontario Municipal Board, under its enabling statute, has authority to award costs comparable to that of the OEB. However, the Ontario Municipal Board's policy generally has been not to award costs where it feels the dispute is bona fide and the parties have acted reasonably. The Ontario Municipal Board's usual practice of not awarding costs and therefore leaving each party to pay its own legal and technical expenses was outlined in a 1978 decision:

> "This Board, however, is of the firm opinion that the hearing of this matter regardless of any delays which may have been occasioned, is the right of the citizens of the Province of Ontario under the Planning Act ... and unless the objection or objections be deemed to be frivolous or without merit, no order as to costs should issue ..." (Re Central Wellington Planning Area Official Plan Amendment (1978), 8 O.M.B.R. 263 at 284.)

There have, however, been a number of exceptions to this general rule and costs have been awarded to ratepayer intervenors.

CHAPTER III - SUMMARY OF SUBMISSIONS BY ISSUES

ISSUE 1: FOR WHAT REASONS SHOULD/SHOULD NOT COSTS BE AWARDED TO INTERVENORS?

ONTARIO MUNICIPAL ELECTRIC ASSOCIATION

The OMEA's position was that there are no compelling reasons why costs should be awarded more frequently by the Board.

The OMEA gave a number of reasons why it takes this position, among them being:

- the granting of funds to advance private positions is a political decision best left to elected representatives;
- a change of current Board policy is inappropriate unless the Board gets direction from a politically accountable source; failing such a direction, the awarding of costs to intervenors would tend to politicize the Board's role;
- awarding of costs against applicants would tend to raise the cost of power to consumers which would be inappropriate without a Government statement;

- power consumers should not be forced to bear the costs of public interest advocates who cannot raise funds themselves;
- awards of costs would lengthen hearings, make the administrative process more complex, encourage "gadfly" interventions and increase consumers' costs;
- cost awards would become the reason for intervention and, combined with publicity, would lead pressure groups to clog the administrative process;
- counsel and experts would not be funded by those they represent, thereby reducing accountability for the direction of their case; and
- the reliance by intervenors on the Board for funding will also mean that intervenors may be influenced by the need to retain the Board's "goodwill".

Furthermore, the OMEA believed that the public interest is already adequately protected so

that funded participation by public interest groups is unnecessary; the Board's mandate is to act in the public interest and balance conflicting interests and it can rely on the expertise of its Members, staff, and counsel in reaching its decisions. As well, the OMEA suggested that cost awards would encourage groups to take positions even when their interest is limited.

In its final submission the OMEA took issue with several of the reasons put forward for awarding costs to intervenors. First, the OMEA maintained that it is not the Board's duty to encourage public participation. Rather, it is the Board's duty merely to provide a forum where the public may participate. Second, the OMEA contended that the awarding of costs to intervenors does not increase the quality or quantity of information available for decision-making; evidence from the United States suggests that parties who receive costs often offer information or arguments supplied by others.

Third, the OMEA maintained that the present system does not create a problem in terms of perception of equity or fairness. Fourth, the OMEA suggested that financial need is not a valid criterion. The OMEA's position was that if intervention is a genuine priority for a group then it will find the funds. The OMEA feared that cost awards may become the primary motivation for intervention. The OMEA maintained that the complexity of the financial need criterion is another reason to reject it. Finally, the OMEA rejected the notion that costs should be awarded against applicants because they enjoy the benefits of monopoly status. The OMEA suggested that these applicants are highly regulated and do not earn excessive profits.

MR. FRANK HUBSCHER

Mr. Hubscher supported public funding of intervenors appearing before the Board (as opposed to merely cost awards) in order to maximize public involvement in Board hearings.

Mr. Hubscher was concerned that the views of public interest groups be heard to offset the views of both Board staff and utilities.

ONTARIO HYDRO

Traditionally, Ontario Hydro has not supported cost awards on the grounds that as a public utility, it must act to minimize costs to its customers. However, Ontario Hydro has now modified its position. It generally supports the awarding of costs to intervenors, to the extent that the intervention is judged to have contributed to an overall increase in the effectiveness of the hearing, and thereby may reasonably be deemed to have provided a net benefit to customers.

Ontario Hydro submitted that cost awards should be limited to those intervenors having financial need.

ENERGY PROBE

Energy Probe asserted that the primary motivation for awarding costs to intervenors is to allow a meaningful contribution to the

hearing process from parties for whom financial barriers are a concern. Energy Probe stated that cost awards are necessary to encourage participation for a number of reasons:

1. The hearing process is basically adversarial in nature. For this process to work there must be balance in the points of view presented. However, most individuals and public interest intervenors cannot afford to present their case properly, and certainly not year after year.
2. Effective interventions before the Board require the assistance of expert advisors or witnesses and representation by counsel. Such intervention should not depend on the vagaries of fund raising. Ironically, when money is tight interventions to protect the consumer may be more desirable but less possible, in the absence of cost awards.

3. Without full participation by a variety of interests the hearing process runs the risk of being dominated, or appearing to be dominated, by the regulated industry with little consideration of alternatives. Participation by a variety of intervenors can enhance public confidence in the impartiality of the Board.

FLOWERS CANADA

Flowers Canada identified several reasons for the awarding of costs to intervenors. First, cost awards would establish a more equitable system for all parties. If a utility can treat costs as a part of doing business and pass them on to its customers then a policy should be developed to afford equal treatment to intervenors. Second, cost awards would permit groups in financial need to conduct the necessary research to make meaningful contributions at hearings. Third, they would reward intervenors for their contributions that could ultimately benefit all parties.

MR. JAMES A. GIFFEN, Q.C.

Mr. Giffen did not address this issue. However, he adopted the submissions by FONOM, advocating the awarding of costs to meaningful interventions that represent broad interests and where a demonstrated need exists.

CITY OF KITCHENER

Kitchener's position was that although need may be relevant in deciding whether costs should be awarded, a more important factor is whether the intervenor has made a substantial contribution; if so, the intervenor deserves to be rewarded for its contribution.

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

CELA recommended that costs be awarded to intervenors for two main reasons.

First, CELA maintained that the statutory provisions for public hearings in the OEB Act mean that it is Ontario government policy to encourage public participation in Board hearings. To ensure that opinions and information from a wide variety of interests are considered at such hearings, which have become increasingly

complex and technical in nature, meaningful public participation requires the assistance of qualified experts and counsel. However, such experts and counsel are not available to many citizens' groups without some provision being made for the awarding of costs. Therefore, without the awarding of such costs, participation by citizens' groups may be ineffective and the hearing may become one-sided.

Second, CELA pointed to the economic imbalance between applicants and intervenors as a reason for awarding costs to intervenors. Applicants generally have greater resources to further their point of view. Moreover, they have the advantage of being able to pass the costs of their representation along to their customers through increased rates. Present tax laws also allow corporations to claim hearing costs as a taxable expense. Cost awards were seen by CELA as an extremely important mechanism for redressing the imbalance of resources

between applicants and intervenors, in order to ensure that the Board can be apprised of all the options and arguments.

THE CONSUMERS' GAS COMPANY LTD.

Consumers' supported the present practice of the awarding of costs as an exception, on an ad hoc basis, and not as a rule.

Consumers' opposed intervenor cost awards and claimed that the present system has worked well and should not be placed in jeopardy. Consumers' believed that the involvement of the utilities, intervenors, Board staff and counsel ensure that the Board has balanced viewpoints to consider. Consumers' maintained that under the present system:

> "The Board has fulfilled its mandate under the Act. Customers generally are satisfied. A regulated commercial enterprise is fulfilling its function in society as a result. Broader participation does not mean better participation."

Consumers' also claimed that there are specific disadvantages to an intervenor cost

awards regime. It maintained that the purpose, or at least the effect, of increased cost awards would be increased participation by intervenors and this might imperil the success of the present system. Specifically, Consumers' believed that its good working relationship with Board staff (involving a precise flow and testing of information) might be disrupted. Also, it believed that the quest for uniformity in gas rates might be disrupted by a greater number of participants seeking individual rates, thereby departing from the classic utility regulation objective of avoiding discrimination in rates.

Consumers' also argued that increased participation by intervenors will have adverse consequences on the hearing process:

1. The greater the number of intervenors, the greater the time consumed.
2. The greater the number of intervenors, the greater the degree of overlap and repetition.

3. If cost awards are based on contribution, overlap and repetition will be increased since each counsel will want to build a record on which to claim the greater contribution.

4. If cost awards are based on contribution, the Board may find difficulty in distinguishing between the relative contributions of intervenors, especially if there is prolonged evidence and argument, and repetition.

MRS. IRENE MOONEY

Mrs. Mooney's position was that intervenors should not be awarded costs. Mrs. Mooney was concerned that taxpayers' money not be wasted. In her view, taxpayers already pay for the public interest to be represented by the Board.

However, Mrs. Mooney suggested that the Board consider the convenience of intervenors to keep their costs low and she recommended that a Board lawyer provide help to intervenors when requested.

ASSOCIATION OF MAJOR POWER CONSUMERS

AMPCO did not specifically address this issue, but recommended that awards of costs should be considered in extraordinary hearings only, and not rate hearings. AMPCO pointed out, however, that certain aspects of rate hearings may be extraordinary, inasmuch as they deal with issues and principles that will have influence on a long-term basis. AMPCO suggested that hearings under s.37(4) of the OEB Act, which deals with matters in addition to proposed rate changes in Hydro references, might be considered extraordinary.

AMPCO submitted that the funding of public interest groups engaged in the public participation process should be a matter to be determined by broad government policy. By this, AMPCO seemed to suggest that not only should the Board formulate a policy on costs, but also that the Ontario government might consider the direct funding of public interest groups seeking to intervene before the Board.

INDUSTRIAL GAS USERS ASSOCIATION

IGUA opposed the awarding of costs to intervenors on a more regular basis. IGUA maintained that costs should be awarded to intervenors only in special or unusual circumstances, or when the extraordinary nature of the proceedings justifies such an award. IGUA considered that proceedings may be "extraordinary" in either a procedural or substantive sense.

It was concerned that the regular awarding of costs to intervenors might increase the number of intervenors, fragment the constituent base for the various sectors of the public interest, and thus impede the efficiency of the proceedings.

IGUA's view was that the fundamental reason why a party should intervene before the Board is to obtain some relief for the sector of the public interest which that party represents. To encourage interventions by only financially responsible parties (financially responsible through a broad base of constituents

or otherwise), the Board should not grant costs to intervenors on a routine basis. Moreover, the Board's cost awards policy should provide for orders of costs against intervenors where appropriate.

FEDERATION OF NORTHERN ONTARIO MUNICIPALITIES

FONOM argued specifically why costs should be awarded to municipalities. FONOM maintained that the financial strain imposed by interventions on municipalities and other interested parties must be alleviated so that all views are presented at hearings and such hearings do not become one-sided. FONOM submitted that since 1982 the costs of intervening before the Board have prevented FONOM from representing the interests of the Northern Ontario fixed rate natural gas customer whose rates have increased sharply.

FONOM submitted that as municipal interventions are a normal and important part of the rate making process, the costs of such interventions should be accommodated by the general

revenue of the system or, if this is impractical, by government funds administered by the Board. FONOM maintained that the present system, where industrial intervenors can pass on costs to consumers or write-off costs for tax purposes, in contrast to municipalities, is inequitable. FONOM also submitted that it is inequitable for non-gas-consuming citizens of municipal intervenors to have to contribute through municipal taxes towards the cost of advancing the interests of gas-consuming citizens. FONOM did not support the payment of costs to industrial intervenors.

FONOM rejected the substitution of a government or a Board advocacy office to represent the public interest in rate hearings instead of the awarding of costs to intervenors in such hearings. It maintained that an advocate's office would have difficulty representing a wide range of public interests and ultimately would end up selecting one public interest

over another. It also feared that intervenors would lose their right to choose counsel and witnesses they believe would speak effectively for them. Finally, FONOM feared that with time the Board and the permanent public interest advocate would become comfortable with each other and the energy introduced by fresh faces and ideas would be lost.

UNION GAS LIMITED

Union submitted that there is no need to alter the Board's current practice of awarding "costs to intervenors only in extraordinary circumstances". It is not opposed to the principle of awarding of costs to intervenors and supports awards in limited circumstances where a significant contribution has been made to the hearing by an intervenor, who without costs would have had insufficient financial resources to participate.

NEW DEMOCRATIC PARTY CAUCUS

The NDP maintained that the Board's discretionary powers allow it to award costs in other than "extraordinary and unusual" circumstances. Nevertheless, the NDP saw the need for a statement of Government policy to cover a definite set of guidelines that would be published by the Board for the awarding of costs.

The NDP recommended that as the Ontario government appears to be increasingly committed to encouraging public involvement in areas of decision-making, and has provided statutory provisions for public hearings, costs should be awarded to encourage public participation in such hearings.

The NDP maintained that public hearings are to ensure that the regulatory agency will have a wide variety of opinions and information on which to make its decision. However, the ability of public interest intervenors to cope with complex and technical matters is directly related to their financial resources, which

enable them to enlist competent counsel and/or expert witnesses. Without these intervenors public participation can become meaningless and the hearing too one-sided.

CONSUMERS' ASSOCIATION OF CANADA (ONTARIO)

The CAC's position was that the principal reason for awarding costs to intervenors in rate proceedings is to provide a more balanced representation of views and testimony. The CAC maintained that the active participation of parties other than the applicant is necessary to ensure that the applicant's assertions are valid. The CAC pointed out that the applicant has a strong economic interest, and the financial resources to pursue its interest. The CAC considered that the application must be tested thoroughly and that the participation of Board staff and counsel was inadequate to test the applicant's case. They might lack experience to test thoroughly all aspects of the case and might take a middle position on the issues rather than one of strong opposition. The

CAC also believed that the active participation of parties other than the applicant and Board staff is necessary to give the process legitimacy and to provide a balance and appearance of equality.

The CAC maintained that cost awards would encourage better quality interventions by permitting intervenors to retain knowledgeable experts and counsel, and that informed opposition to applications would deter applicants from applying for unjustified increases. Cost awards would also encourage representation of consumers, which is only fair as the consumer ultimately ends up paying the total cost.

NORTHERN AND CENTRAL GAS CORPORATION LIMITED

Northern recommended that the Board award costs to intervenors for meaningful interventions to encourage participation by all parties that are affected by its decisions. Northern, however, cautioned the Board that efforts to achieve public participation should

be critically examined in light of the objectives of ensuring an efficient decision-making process and avoiding unnecessary costs.

INTER-CITY GAS CORPORATION - ONTARIO OPERATIONS

Inter-City maintained that costs should be awarded to intervenors in order that more parties will participate in the regulatory process. Inter-City believed that such participation may foster a greater knowledge and understanding of the applicant's circumstances and operations and may provide for a better relationship between the applicant and its customers.

However, Inter-City cautioned against participation for participation's sake and indicated that it believed Board staff and counsel already scrutinize its applications adequately. It expressed concern that increased participation by intervenors facilitated by the awarding of costs will result in increased costs to its customers.

CONSUMERS FIGHT BACK

CFB maintained that the Board's mandate is to review the level and structure of rates and services within its jurisdiction to ensure that they are in the public interest. To carry out this mandate it is necessary to encourage and facilitate responsible, informed and effective intervention by consumers.

In the opinion of CFB, the Board's practice of rarely awarding costs requires liberalization to allow the Board to better fulfill its mandate. Given the complexity of the issues and evidence before the Board, intervenors must incur substantial expenses if they are to intervene usefully. However, most independent consumer groups cannot afford such expenses.

Responding to the argument that the Board has done a good job without cost awards, CFB maintained that a policy which does not encourage and facilitate public participation violates the principle that justice must not just be done, it must be seen to be done.

Moreover, CFB contended that the quality of hearings will improve with increased consumer intervention.

In response to the argument that Special Counsel can represent the public interest, CFB maintained that Special Counsel must necessarily balance various public interests and specific groups of consumers should not have to rely on his or her decision on that balance. CFB indicated that there were bound to be matters of importance raised by independently represented consumer groups that Special Counsel might overlook or disagree with.

NORTH YORK HYDRO

North York Hydro was opposed to the awarding of costs to intervenors. North York Hydro favoured increased public participation at Board hearings, but did not believe that cost awards should be made to encourage such participation. North York Hydro believed that the hearing process itself discourages participation and should be reformed. North York

Hydro suggested that a less formal and adversarial process, such as prevailed at the Robarts Commission, would encourage individuals to come forward. Also, it recommended that the Board demonstrate more clearly that it is looking after the public interest by pursuing topics not presented by applicants and/or intervenors.

North York Hydro perceived that a system of providing awards to intervenors would be accompanied by a reduction in Board expenditures for legal counsel, consultants and analysts. It opposed a cost award system that would precipitate expansion of Board costs which it felt would have a snowballing effect. North York Hydro also opposed interim awards; however, if they are made, North York Hydro proposed they be funded from a special fund administered by the Board.

UNION HALL ACTION COMMITTEE

Union Hall submitted that there must be adequate opportunities for citizens' groups to participate in hearings on major energy decisions on a basis that takes full account of their limited funds, time and expertise. Citizens would otherwise be financing applicants to act, sometimes against their interests, with the money they pay in rates.

NO TOWERS FEDERATION

No Towers supported the awarding of costs to intervenors as they are incurred in order that intervenors of limited means, especially those who are directly affected by the decision of the Board, can make effective presentations. It submitted that such presentations are an effective balance to the point of view of the applicant which can spend vast sums of money on its proposal. It also stated that balanced presentations of opposing ideas enable the Board to make informed decisions.

ISSUE 2: IN WHAT KINDS OF PROCEEDINGS SHOULD COSTS BE AWARDED?

ONTARIO MUNICIPAL ELECTRIC ASSOCIATION

OMEA supported the system of awarding of costs adopted by the APUB. However, the OMEA rejected the awarding of costs for policy making hearings or for portions of rate adjudication hearings that deal with broad policy matters. It was its view that policy-making aspects of hearings should be borne by the Board and through it the taxpayer would bear the cost.

ONTARIO HYDRO

Although Ontario Hydro limited its submission to cost awards in Ontario Hydro references, its counsel agreed that cost awards in recognition of valuable contribution could be made in both gas rate hearings and Hydro references.

ENERGY PROBE

Energy Probe recommended that costs be awarded in both routine, as well as generic hearings of Hydro. Non-routine issues often arise in routine hearings, and public

participation in routine cases is valuable and should be encouraged. There should be no distinction between generic and routine hearings. Such participation would discourage the domination of, or apparent domination of, the hearing process by the regulated industry and increase the opportunity for intervenors to gain expertise and insight into the hearing process.

MR. JAMES A. GIFFEN, Q.C.

Although Mr. Giffen did not address this particular issue, he adopted the submission of FONOM.

CITY OF KITCHENER

Kitchener has in the past intervened in Union main rate hearings. It did not address this issue specifically, but, in the case of rate hearings it advocated the awarding of costs to intervenors.

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

CELA recommended that cost awards should be made in rate hearings and generic hearings as both are extremely complex, require expert witnesses and deal with matters of principle and public interest.

THE CONSUMERS' GAS COMPANY LTD.

Consumers' opposed the introduction of a mandated award of costs in rate hearings and stated that they should be granted only on an ad hoc basis as presently is the case.

ASSOCIATION OF MAJOR POWER CONSUMERS

AMPCO, an intervenor in Hydro references, recommended that cost awards should be considered only in extraordinary hearings and not in normal Hydro rate hearings. However, AMPCO recognized that from time to time aspects of rate hearings may be extraordinary inasmuch as they deal with issues and principles which will have influence on a very long-term basis. In such cases AMPCO accepted that costs could be awarded.

INDUSTRIAL GAS USERS ASSOCIATION

IGUA maintained that costs should be awarded to intervenors in accordance with the guidelines described in E.B.R.O. 364-II and E.B.R.O. 364-II-A. Costs should be awarded to intervenors only in special or unusual circumstances or when the extraordinary nature of the proceedings justifies such an award.

FEDERATION OF NORTHERN ONTARIO MUNICIPALITIES

FONOM submitted that cost awards at a minimum must be available in both Phase I and Phase II gas rate hearings and other significant proceedings as they have the most potentially severe impact on small residential and commercial customers.

UNION GAS LIMITED

Union stated that the Board should not distinguish between particular types of proceedings in determining whether or not costs should be awarded. Union maintained that the same criteria for eligibility should apply to all types of proceedings. However, the nature of the proceeding may affect both the question

of who should be allowed to intervene and who should be awarded costs based on the said criteria.

NEW DEMOCRATIC PARTY CAUCUS

The NDP recommended that costs should be awarded in both generic hearings and rate hearings. In generic hearings or other hearings where there is no applicant, costs should come out of the Board's budget and eventually out of the Consolidated Revenue Fund of the province. In rate hearings costs should be paid by the applicant.

CONSUMERS' ASSOCIATION OF CANADA (ONTARIO)

The CAC recommended that costs be awarded in the following types of hearings:

1. Applications for rate increases;
2. Generic or policy-making hearings where policy affecting a significant public interest is being debated. The CAC included hearings under s.36 of the OEB Act which are references from the Lieutenant Governor in Council;

3. Those involving gas storage or pipeline construction projects where an individual such as a landowner is put to expense to defend his or her interests;
4. Those concerning the discontinuation of gas or electricity supply;
5. Those involving transfer of ownership of a distribution facility if such transfer might affect the cost or quality of the service being rendered; and
6. Those involving a major acquisition by an entity whose rates and tariffs are regulated by the Board.

NORTHERN AND CENTRAL GAS CORPORATION LIMITED

Northern recommended that costs should be awarded in all proceedings before the Board where its eligibility criteria have been met. Northern made no recommendation as to whether costs should be awarded in proceedings under s.21 of the OEB Act which deals with the authority to store gas and the determination of the amount of compensation payable, because

Northern is not directly involved in that sort of an application.

INTER-CITY GAS CORPORATION - ONTARIO OPERATIONS

Inter-City is not opposed, as a matter of principle, to the Board adopting a policy which would qualify intervenors for an award of costs. However, intervenor costs should not be awarded in proceedings before the Board related to increases in the wholesale cost of gas to the company.

CONSUMERS FIGHT BACK

CFB supported the awarding of costs to intervenors in both rate hearings and issues hearings. In rate hearings costs should be paid by the applicant company. Costs related to issues hearings should be payable on a pro-rata basis by the utilities affected by the questions determined.

ISSUE 3: WHO SHOULD BE ELIGIBLE/INELIGIBLE FOR COST AWARDS?

ONTARIO MUNICIPAL ELECTRIC ASSOCIATION

The OMEA suggested three criteria to determine eligibility for cost awards. First, the intervenor should be informed, independent and have a specific purpose for intervening. Second, the intervention should be responsible, reasonably objective and contribute to the Board's understanding of the issues. Third, the intervenor should not be able to absorb or pass on the costs of a proceeding to those who benefit directly from it.

The OMEA believed that these principles can best be implemented by adopting guidelines based on those published by the Alberta Public Utilities Board.

The APUB distinguished between three different types of intervenors. The first advocates benefits that would flow only to those it represents. The OMEA submitted that the APUB has stated that, on principle, it does not support the awarding of costs to the large

industrial users who intervene on their own behalf.

The second advocates a position dealing not only with its own rates but also with the general problems of rate base, fair return, revenue requirement and rate design. Subject to an APUB determination that the intervention benefitted all customers of the utility, the intervenor is funded by awarding costs to be assessed against all the customers of the utility.

The third type of intervenor advocates a "public interest" position not specifically associated with the customers of the applicant. The APUB prefers not to award costs to this type of intervenor since such an intervenor purports to intervene on behalf of the citizens of a province and should look to the entire province for its funding.

The OMEA noted with approval, regulations of the Alberta Energy Resources Conservation Board which permit denying costs, in whole or in part, to otherwise eligible intervenors:

"1. if the Board is not satisfied that the costs were reasonable and directly and necessarily related to the proceeding;

2. if the Board is not satisfied that the intervenor was in need of legal or technical assistance in the preparation and presentation of his intervention;

3. if the Board is not satisfied that the intervention was conducted economically;

4. if, in the opinion of the Board,

a) the intervention and its presentation was unnecessary, irrelevant, improper or intended to delay the proceeding before the Board, or

b) the claim is excessive, having regard to the nature of the proceeding and the intervention."

MR. FRANK HUBSCHER

Mr. Hubscher suggested that an independent and centralized Office of the Consumers' Advocate be created for the Board and the Ministry of Energy. It would evaluate applications for funding and make funding decisions. To be eligible for funding an intervenor would have to represent a particular interest or

point of view that could be reasonably expected to contribute to a full and fair determination of the issues involved in the adjudication proceeding. Also, the intervenor must be without sufficient resources to participate effectively in the hearing in the absence of funding.

ONTARIO HYDRO

The position of Ontario Hydro was that costs should be awarded to respondents who seek them in their final argument, and establish:

a) a useful and effective contribution to the hearing; and

b) financial need, such that the prospect for an award of costs ensured an essential contribution to the claimed usefulness and effectiveness of intervention.

Ontario Hydro did not believe that customer representative groups (such as OMEA, AMPCO, ONGA) should be awarded costs.

ENERGY PROBE

Energy Probe submitted that individuals, small users, and public interest groups should be eligible for cost awards subject to appropriate safeguards. Intervenors with a sizeable commercial interest in the hearing do not need such an encouragement to participate as they reap sufficient economic benefit from participating.

FLOWERS CANADA

Flowers Canada recommended that if, in the opinion of the Board, additional research is required to support any argument from an intervenor who cannot write off such expense as a business expense, the Board should be granted the authority to assure that such research is carried out. The granting of funds would only result after a hearing where need is established.

MR. JAMES A. GIFFEN, Q.C.

Mr. Giffen did not address this issue. However, he adopted the submissions of FONOM.

CITY OF KITCHENER

The City of Kitchener recommended that intervenors should be eligible for cost awards where their contributions are essential or substantially useful to the Board in its decision-making process.

Kitchener suggested that municipalities should be eligible for cost awards if they meet these two criteria, even though they are in a position to pass on the costs of intervention through taxation or user charges. Kitchener took this position on the basis that: the onus is on the applicant to establish entitlement to a rate increase; that Kitchener must defend its own economic interests; and that the Board has the public interest at heart in ensuring that the onus is discharged. If Kitchener contributes to the Board's determination on the broader issues, it deserves to be rewarded to some extent for its efforts and should not be penalized because it is not in financial need.

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

CELA recommended that all intervenors who meet the following criteria should be eligible for funding:

> "1. Whether there is a clear ascertainable interest to be represented and whether the intervention would make a contribution to the hearing;
>
> 2. whether there is a need for funds;
>
> 3. whether costs would address an economic imbalance among the parties; and
>
> 4. the nature and complexity of the hearing."

CELA stated that "clear ascertainable interest" means that the intervenor should have a general interest that can be enunciated and not necessarily a legal interest. CELA admitted that the contribution aspect of the first criterion was probably the most relevant and that the third criterion is really an add-on to the second.

CELA submitted that as financial need is a criterion, in most cases large corporate

intervenors would not be eligible to obtain costs. CELA does not necessarily exclude municipalities from recovering costs.

CELA submitted that costs should usually be awarded to intervenors who meet the above criteria. Only if the intervention is frivolous or vexatious should costs be denied.

THE CONSUMERS' GAS COMPANY LTD.

Consumers' did not address this issue specifically. However, Consumers' considered it unfair that intervenors with a specific economic interest should be awarded costs that might be passed on to other customers of the applicant.

ASSOCIATION OF MAJOR POWER CONSUMERS

AMPCO recommended that awards of costs to intervenors should be considered only in extraordinary hearings. Any criteria beyond this requirement were not addressed.

INDUSTRIAL GAS USERS ASSOCIATION

IGUA maintained that eligibility criteria for cost awards should not be broadened and the Board should continue the policy of awarding costs only in special, unusual or extraordinary circumstances.

IGUA was of the view that if intervenors are going to take positions then they should be prepared to stand behind them financially. IGUA believed that associations will always find the resources to pursue issues that concern them. The financial risk would encourage intervenors to focus on the issues.

FEDERATION OF NORTHERN ONTARIO MUNICIPALITIES

FONOM supported the criteria for eligibility for costs awarded in the past as used by the Board. The intervenor must:

1. Possess a substantial interest in the outcome (or must speak for people who do);
2. Participate responsibly;
3. Contribute to better understanding of the issues by the Board; and
4. Have demonstrated financial need.

FONOM submitted that it should be deemed to be in need.

FONOM felt that such criteria could be set out in a guideline or by regulation and that the criterion of "unusual" or "extraordinary" circumstances should not be a basis for future cost awards.

FONOM did not believe that industrial intervenors should be paid their costs as there was no evidence that the absence of cost awards had deterred participation by that class of user.

UNION GAS LIMITED

Union recommended that the Board should award costs only in limited circumstances where a party has been granted status to intervene, a significant contribution has been made, and the intervenor otherwise has insufficient financial resources to participate.

Union maintained that where a number of persons seek to intervene and their interests can be adequately represented by Board staff

and counsel or other intervenors, then intervenor status should be denied. In this regard, Union submitted that the Board should be guided by s.14 of the OEB Act which vests in the Board the powers, rights and privileges of the Supreme Court as well as by Rule 13 of the new Rules of Civil Procedure and the cases decided under the old rules.

Union maintained that the principal factor in awarding costs should be whether the intervenor seeking costs has made a significant contribution to the proceedings and contributed to a better understanding of the issues before the Board. This contribution must be assessed as having been over and above any contribution made by Special Counsel or other intervenors.

Union recommended that only intervenors who do not have sufficient financial resources to enable them to pursue their interests adequately should be eligible for cost awards.

The company recommended that intervenors who are major customers seeking direct economic

benefits should not be awarded costs, otherwise such costs would be borne eventually by all of the utility's customers, which would be unfair.

NEW DEMOCRATIC PARTY CAUCUS

The NDP maintained that the guidelines for the awarding of costs should require that the intervenor represent an interest group with a legitimate concern for the subject matter of the hearing; that the intervenor's presentation is meaningful and therefore assists the Board in making a decision; and that the group or organization is financially needy, and therefore any award of costs would correct an economic imbalance among the intervenors.

The NDP recommended that citizens' groups with essentially the same interests should be required to co-ordinate their presentations in order to be eligible for cost awards and costs awarded would be divided among the groups.

The NDP proposed that costs should be awarded to all intervenors who meet the criteria established by the Board. Costs

should be denied only if the intervention is frivolous or vexatious.

The NDP was of the view that generally, municipalities should not be eligible for cost awards because they can recover them from their communities. Thus, municipalities are less likely to be inhibited in coming forward and making their case than an organization with a limited base and which must raise funds for that particular hearing.

CONSUMERS' ASSOCIATION OF CANADA (ONTARIO)

The CAC recommended that eligibility for cost awards should be determined on a case by case basis and based on the quality and relevance of the information provided or the contribution made by an intervenor. It maintained that the eligibility rules used by the CRTC should be considered. The CAC stated that under these rules the CRTC may award costs to any intervenor who:

> "1. has or is representative of a group or class of subscribers that has an interest in the

outcome of the proceeding of such a nature that the intervenor or group or class of subscribers will receive the benefit or suffer the detriment as a result of the order or decision resulting from the proceeding;

2. has participated in a responsible way;

3. has contributed to a better understanding or the issues by the Commission."

The CAC recommended that intervenors whose participation is frivolous or irrelevant should not be eligible for costs.

The CAC suggested that an indication by the Board at the time a Notice of Hearing is published as to the Board's policy on cost awards for that type of hearing would be helpful to intervenors who would like to intervene but who might be precluded by reason of the costs involved. The CAC envisaged that the eligibility requirements for cost awards may vary according to the type of hearing.

NORTHERN AND CENTRAL GAS CORPORATION LIMITED

Northern recommended that the Board should award costs to those intervenors who meet the criteria:

1. that the intervenor has demonstrated financial need;
2. that the intervenor has established a substantial interest in the outcome of the proceedings and that the substantial interest required independent representation by the intervenor;
3. that the intervenor has participated in a reasonable way in the hearing; and
4. that the intervenor has contributed to a better understanding of the issues by the Board.

Northern considered that large industrial users represented by IGUA should not be eligible for costs, but that municipalities, or representatives of municipalities such as FONOM, should be eligible.

INTER-CITY GAS CORPORATION - ONTARIO OPERATIONS

Inter-City recommended that to qualify for costs the intervenor must make a substantial contribution to the proceedings and contribute to a better understanding of the issues before the Board. It suggested that the examination by the intervenor and the evidence led by the intervenor should be assessed against the general regulatory practices of the Board. Inter-City submitted that "creative or interesting thinking that is clearly out of step with regulatory practice should not be compensated."

Inter-City maintained that the ability to finance an intervention should be a factor in the awarding of costs and that it is incumbent upon any intervenor to do its best to fund its own intervention. For example, if any association of residential homeowners is formed, reasonable steps should be taken to "tithe" its members a reasonable amount to help defray costs of intervention. Inter-City was of the view that neither municipalities nor special

contract customers should qualify for intervenor costs as a matter of principle, because they assert very parochial interests.

CONSUMERS FIGHT BACK

CFB recommended that there be three criteria for eligibility for a cost award. These are that the intervenor must:

1. have participated responsibly;
2. have made a significant contribution to the evidence at any stage (by interrogatories, cross-examination, or evidence) or to final argument; and
3. have not received funding specifically for that intervention through grants or donations from any other person (including any level of government).

CFB suggested that the most important criterion is that the intervenor must have made a substantial contribution to the proceedings. It maintained that intervenors in considering this criterion will have to take into account, among other things, that there is a capable

Special Counsel. CFB does not believe that interventions by small groups must necessarily be consolidated for these groups to meet this criterion.

With regard to criterion 3 above, CFB considered that there should be no disqualification from eligibility for costs because the principle objective of an intervenor or organization is intervention in Board hearings. CFB suggested that the Board should not look at the objectives of the organization, but whether its contribution requires some compensation having regard to the intervenor's available funding.

CFB recommended that there should not be a criterion requiring the intervenor to have a substantial interest in the outcome of the proceedings and represent the interests of a substantial number of subscribers. CFB maintained that these are issues relevant to standing, not eligibility for costs. Moreover, CFB observed

that there have been instances where individuals, or very small groups, officially representing only themselves make valuable contributions to regulatory hearings.

CFB was of the view that the civil litigation notion of indemnification should not be a factor in the awarding of costs. Under this rule only an intervenor group which had personally paid the legal and witness fees and other expenses of its intervention, or was legally liable to do so, would be allowed to receive costs. This would eliminate costs to impecunious groups whose expenses had of necessity been funded by a third party charitable organization or benefactor. It could also prevent the inclusion in cost awards of amounts to cover staff salaries which did not vary as a result of intervention. CFB observed that the issue of whether the strict indemnification rule applies to an administrative tribunal is currently before the Supreme Court in Bell Canada v. CRTC, CAC, NAPO et al.

NORTH YORK HYDRO

North York Hydro maintained that, should the Board institute a cost award system, it must be limited to intervenors who have made a recognizable, useful contribution leading to improved effectiveness or efficiency in the work with which the Board is charged.

It opposed cost awards for narrowly representative or self-serving interest groups or those whose interests transcend Ontario boundaries.

North York Hydro recommended that organizations failing to fully disclose membership, sources of financing and significant affiliations be ineligible for any award. It also recommended that any political party be specifically excluded from cost awards.

NO TOWERS FEDERATION

No Towers, being a group affected by Ontario Hydro's planned expansion of one of its major transmission lines, limited its discussion to intervenors such as itself, a group of individuals in close enough proximity to an

energy related project to suffer detrimental effects from that project. It stated that such intervenors should be eligible for awards of costs as they are incurred, rather than at the end of a hearing.

ISSUE 4: FOR WHAT KINDS OF EXPENSES SHOULD COSTS BE AWARDED?

ONTARIO MUNICIPAL ELECTRIC ASSOCIATION

OMEA stated that under s. 28 of the OEB Act the Board has broad powers to determine the type and amount of costs to be awarded. OMEA did not specifically deal with this issue, but it did adopt the APUB approach that the Board should deny costs if it was not satisfied that the intervenor was in need of legal or technical assistance in the preparation or presentation of its intervention.

The OMEA quoted from the APUB requirements that:

> "The Board also may refuse to pay fees to officials of intervenors, to compensate for time spent educating either the client or the lawyers, or to award costs for activities helpful to the intervenor solely for purposes other than the hearing in question."

ONTARIO HYDRO

Ontario Hydro stated that s.28 of the OEB Act, which empowers the Board to award costs, does not specify criteria for the Board to follow.

Ontario Hydro recommended that criteria be established to guide the Board, but did not specify what kinds of expenses should be awarded.

ENERGY PROBE

Energy Probe recommended that costs be awarded for all expenses related to full participation, including: expert witnesses and consultant fees; counsel fees; transcript; travel; photocopy; other out of pocket expenses; and compensation for preparation and presentation time of the staff of a public interest group intervenor or the time spent by an individual intervenor.

Energy Probe recommended that no distinction be drawn between staff counsel and outside counsel when costs are awarded. If such a distinction were made, there would be a lengthy, formal accounting process where the overhead attributable to the staff counsel's position in the organization would have to be accounted for

separately from the general overhead of the organization; alternatively the organization would simply restructure themselves and hire outside counsel. The latter should not be encouraged as there is value in having experienced people return to the hearing process.

FLOWERS CANADA

Flowers Canada was mainly concerned that costs be awarded in advance so that intervenors can conduct the necessary extensive research that might be required to support an argument.

MR. JAMES A. GIFFEN, Q.C.

Mr. Giffen did not address this issue, but adopted the submissions by FONOM.

CITY OF KITCHENER

Kitchener did not address this issue directly but suggested that at least a portion of the fees of expert witnesses be paid if the Board finds that the intervention was of significant benefit to its decision-making process.

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

CELA maintained that cost awards include but not be restricted to: both expert and legal fees, including research; preparation and presentation time; transcript costs; and all receipted disbursements incurred for the hearing.

CELA pointed out that although it is funded by the Ontario Legal Aid Plan, its clients must cover all their expert witnesses' expenses, and that any other costs it recovers are returned to the Plan.

THE CONSUMERS' GAS COMPANY LTD.

Consumers' contended that the present practice of the Board relating to intervenors' costs is fair.

INDUSTRIAL GAS USERS ASSOCIATION

IGUA felt that the present approach to costs followed by the Board was acceptable.

FEDERATION OF NORTHERN ONTARIO MUNICIPALITIES	FONOM recommended the awarding of costs for legal and expert witness fees, and disbursements at the hearing and at the pre-hearing stage where an applicant's pre-filed evidence would be reviewed and assessed in advance.
UNION GAS LIMITED	Union recommended that costs should be awarded only for reasonable out-of-pocket disbursements, reasonable and useful expert input, and reasonable counsel fees (but not for in-house counsel).
NEW DEMOCRATIC PARTY CAUCUS	The NDP recommended that clear, definitive guidelines be formulated by the Board which would indicate which expenses would be recoverable.
CONSUMERS' ASSOCIATION OF CANADA (ONTARIO)	The CAC recommended that, in general, costs should be awarded for the kind of expenses which are required for the proper presentation of an intervenor's case. These

would include fees of expert witnesses for analyzing, preparing and presenting evidence, fees for legal counsel, receipted disbursements and reasonable costs of professional volunteers directly involved in the intervention.

INTER-CITY GAS CORPORATION - ONTARIO OPERATIONS

Inter-City stated that an intervenor, if otherwise eligible for costs, should be paid costs reasonably incurred in effecting intervention but did not feel that it was appropriate for the Board to establish a schedule of hourly rates for counsel and expert witnesses. Total time spent, quality of work and contribution are of equal importance, it maintained.

CONSUMERS FIGHT BACK

CFB submitted that all expenses which were reasonably necessary for the preparation and presentation of a meaningful intervention, or which appeared reasonably necessary at the time they were incurred, should be included in cost awards. Subject to the general criteria for

costs, these would include legal fees, expert consultant and witness fees, and related disbursements. In the case of "lay" participants, reasonable costs of salary forgone in attendance at hearings should be allowed and the related pro-rata share of overhead.

NORTH YORK HYDRO

North York Hydro maintained that serious and well-intentioned intervenors will make reasonable sacrifices in order to participate in a hearing and thus no intervenor should be awarded total costs.

ISSUE 5: WHO SHOULD PAY COSTS AND UNDER WHAT CIRCUMSTANCES?

ONTARIO MUNICIPAL ELECTRIC ASSOCIATION

The OMEA suggested that cost awards should be confined to rate adjudication hearings and where the intervention benefits the intervenor and all customers of a utility, costs should be awarded against the applicant and passed on to the consumer who will ultimately benefit.

The OMEA rejected the awarding of costs in policy hearings on the basis that there is no obvious reason for shifting costs to any one participant. OMEA submitted that it is the duty of the Board to formulate policy, and as such policy benefits the public the Board should bear the costs which are passed on to the taxpayer.

MR. FRANK HUBSCHER

Mr. Hubscher suggested that intervenors be funded through an independent Office of the Consumers' Advocate for the Board and the Ministry of Energy. It would be located as a separate unit and follow the practice of the

Ombudsman in reporting directly to the Ontario Legislature. Groups or individuals could apply to this Office for limited funding with a right of appeal to the Ombudsman.

ONTARIO HYDRO

Ontario Hydro submitted that the Board should assess the participation of each intervenor who seeks an award of costs and make a judgement as to the proportions of that participation which fall into the following categories:

1. Useful and effective to the Board in making its decision relating to the central issues in the case.
2. Useful and effective to the Board from a broader public perspective.
3. Not useful or effective to the Board in its review.

Hydro suggested that it should pay the proportion of costs that fall into Category 1. The proportion falling into Category 2 would not be awarded against Hydro but the Board may

deem it appropriate that such costs be paid out of general revenue. No costs would be awarded against Hydro with respect to Category 3; in fact, in extreme cases of wasteful or repetitive participation, the Board might consider the possibility of awarding costs against an intervenor.

ENERGY PROBE

Energy Probe's position was that the fundamental rationale for regulation is to check the potential for abuse of a monopoly position. Therefore, it is appropriate that the costs of such regulation, including costs awarded to intervenors, should be paid by the applicant who benefits from the monopoly status.

FLOWERS CANADA

Flowers Canada suggested that the Board provide costs in advance to intervenors who cannot write off their costs as business expenses, in order that the intervenors could undertake research that the Board had determined would be beneficial.

MR. JAMES A. GIFFEN, Q.C.	Mr. Giffen did not address this issue, but he adopted the submission of FONOM.
CITY OF KITCHENER	Kitchener recommended that costs be awarded against the applicant utility where it is determined that the intervenor's contribution was essential or substantially useful to the Board's decision-making process.
CANADIAN ENVIRONMENTAL LAW ASSOCIATION	CELA maintained that the applicant should pay intervenor costs since this is the practice of all the tribunals currently awarding costs and is reasonable as the applicant has the resources and also stands to gain financially by the decisions of the Board.
THE CONSUMERS' GAS COMPANY LTD.	Consumers' did not address this issue specifically, but felt that costs should be awarded against an applicant as an exception and not as a rule.

ASSOCIATION OF MAJOR POWER CONSUMERS

AMPCO maintained that if an intervenor approached the matter of costs through the government, then funding should come out of the Consolidated Revenue Fund. However, if an intervenor approached the matter of costs through the Board, then the Board should have no iron-clad rule but should determine who pays the costs on a case-by-case basis. If the Board wishes to award costs in a punitive sort of way, then it might award costs against the applicant. However, if there is no punitive element, the Board might pay costs itself.

INDUSTRIAL GAS USERS ASSOCIATION

IGUA supported the payment of costs by the applicant in extraordinary cases. IGUA also supported the payment of costs by the intervenor in appropriate circumstances. This might be done where there had been "frivolous and vexatious participation" by the intervenor designed to delay or frustrate the proceedings.

IGUA contended that costs should only be awarded to intervenors in special and unusual

circumstances or when the extraordinary nature of the proceedings justified such an award.

FEDERATION OF NORTHERN ONTARIO MUNICIPALITIES

FONOM recommended that the utility applicant pay intervenor costs and that such utility be permitted to recover them through its rates.

FONOM suggested that should the Board find this to be impractical, it might consider seeking a pool of funds from government for funding intervenors, to be administered by the Board.

UNION GAS LIMITED

Union envisaged that where an intervenor satisfies the eligibility criteria, costs generally should be paid by the applicant utility and recovered through rates. However, in certain circumstances the intervenor may be required to pay costs, namely where an intervenor substantially and unnecessarily prolongs the length of the proceedings. Union submitted that only intervenors who have insufficient financial resources should be eligible for cost awards against the applicant.

NEW DEMOCRATIC PARTY CAUCUS

The NDP recommended that in rate hearings the applicant should be required to pay costs, but that in generic hearings costs should, for the present, come out of the OEB's budget and eventually out of the general revenue of the province. The NDP's view was that in generic hearings, where there is no applicant and no contestants, it is equitable that costs be paid out of the funds of the province.

CONSUMERS' ASSOCIATION OF CANADA (ONTARIO)

The CAC maintained that who should pay for costs depends on the type of proceeding:

1. **Rate Proceedings**

   The CAC recommended that cost awards for intervenors in rate hearings be paid by the applicant and recovered by it in the same manner as its own and the Board's costs are handled. In the case of unjustified or unwarranted applications for rate increases, consideration should be given to requiring that costs be paid by the applicant's shareholders and not

recovered from the applicant's customers.

2. **Generic or Policy-Making Proceedings**

   The CAC recommended that each proceeding should be judged on its own merits. In general, it suggested that the government should provide the Board with a fund out of which costs could be awarded to intervenors that were deserving and had made worthwhile contributions to the proceeding.

3. **Other Hearings Conducted by the Board**

   The CAC maintained the same approach should be taken as for generic proceedings.

NORTHERN AND CENTRAL GAS CORPORATION LIMITED

Northern recommended that costs awarded to intervenors should be charged against the applicant and considered as part of the applicant's cost of service so that the cost is borne equally by those who benefit from the intervention.

Northern recommended that costs not be awarded against intervenors, claiming that the Board's control over its process should prevent abuse by intervenors.

INTER-CITY GAS CORPORATION - ONTARIO OPERATIONS

Inter-City submitted that intervenor costs should be paid by the applicant; such costs should be amortized through the cost of service with any unamortized balance included in rate base.

CONSUMERS FIGHT BACK

CFB recommended that in rate hearings the costs awarded to an intervenor should be paid by the applicant. CFB maintained that as customers as a whole benefit from the intervention, it is justifiable that the costs be passed on to them. Also, CFB maintained that this system alleviates the "free rider" problem (the incentive to benefit without expense or effort from the work of consumer groups) and the "individual cost-benefit" problem (the disincentive to join a small group when the

costs of the intervention outweigh the individual savings on the utility bill).

CFB recommended that in issues hearings the costs should be payable on a pro-rata basis by the utilities affected by the questions determined. However, CFB would not strenuously oppose such costs being provided from funds allotted to the Board for such purposes.

NORTH YORK HYDRO

In its submission North York Hydro made it clear that it opposes intervenors being awarded costs. However, should the Board decide to award costs to intervenors North York Hydro appeared to envisage that applicants will pay costs at the end of the hearing and that the Board could pay interim costs from a fund established for this purpose.

However, in its final submissions North York Hydro recommended that any expanded cost award system be made through costs chargeable against the Board.

NO TOWERS FEDERATION

No Towers suggested that equal amounts of money be provided for the applicant and all opposing intervenors. However, it was not clear whether it was proposing that the Board provide the funds or whether they should be provided by the applicant.

ISSUE 6: SHOULD THE APPLICANT'S COSTS BE TREATED THE SAME AS, OR DIFFERENT FROM, INTERVENORS' COSTS?

ENERGY PROBE

Energy Probe's position was that applicants are already awarded costs in the sense that applicants' costs are routinely included in the budget approved by the Board, the implication being that the hearing costs are seen as a proper cost of doing business and are therefore appropriate to charge to customers. Energy Probe agreed with this approach so long as the asymmetry of treatment between applicants and public interest intervenors is redressed.

FLOWERS CANADA

Flowers Canada contended that as an applicant's costs are treated as a cost of doing business and are passed on to its customers, the Board should establish an equitable system for all parties. A policy should be developed to afford equal treatment to intervenors.

MR. JAMES A. GIFFEN, Q.C.

Mr. Giffen recommended that in respect of future applications of any kind, the utilities should be required to justify their costs of counsel and experts, subject always to the public production of all documents and cross-examination. As well, Mr. Giffen recommended that the utilities and other applicants should have identical treatment with respect to costs.

CITY OF KITCHENER

Kitchener submitted that the awarding of costs should be entirely within the discretion of the OEB and that there should be no entitlement to costs by anyone as of right.

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

CELA pointed out that in most cases the applicants' hearing costs are passed on to their consumers and treated as part of the normal cost of doing business. CELA maintained that this approach is reasonable but recommended that applicants' costs be subject to the same scrutiny as intervenors' costs, with

the understanding that all of the applicants' costs may not be passed on to their consumers.

In stating that applicants' costs be subject to the same "scrutiny" as intervenors' costs, CELA advocated: First, that the submissions should break costs down more than is done at the present time; and second, that the tariff with a range of counsel fees and expert fees recommended for intervenors be applied to applicants as well.

In CELA's view, there should be a presumption that, having met the criteria, an intervenor's costs would be awarded, with the onus upon the applicant to show where costs should not be awarded.

MRS. IRENE MOONEY

Mrs. Mooney did not address this issue except to state that applicants and intervenors should be prepared to pay their own costs.

FEDERATION OF NORTHERN ONTARIO MUNICIPALITIES

FONOM maintained that applicants' costs should be subjected to scrutiny and should be allowed to be recovered through rates if and to the extent that they are found by the Board to be just and reasonable. Intervenors' costs should be allowed if the criteria have been met, and such costs should be taxed.

CONSUMERS' ASSOCIATION OF CANADA (ONTARIO)

The CAC suggested that in general the applicant's costs should be treated the same as an intervenor's costs.

The CAC recommended that normally, cost awards against an applicant should be recovered by the applicant in the same manner as its own and the Board's costs are handled. However, in the case of unjustified or unwarranted applications for rate increases, consideration should be given to requiring all costs to be paid by the applicant's shareholders and not recovered from the applicant's customers.

NORTHERN AND CENTRAL GAS CORPORATION LIMITED

Northern recommended no change to the existing regime in respect of costs and expenses of the Board chargeable to the applicant.

CONSUMERS FIGHT BACK

CFB did not address this specific issue but recommended that, generally, the applicant should be allowed to pass its costs on to its customers. Where, however, an application is judged to have been significantly unreasonable in content or presentation, or was precipitously withdrawn, the Board should consider having all or part of the applicant's costs borne by the shareholders.

NORTH YORK HYDRO

North York Hydro maintained that in most circumstances applicants should pay their own costs. However, where applicants may incur unnecessary expenses at the instigation or insistence of intervenors and/or the Board, there should be provision for applicants to recover those costs.

ISSUE 7: SHOULD INTERIM COST AWARDS BE MADE AND, IF SO, SUBJECT TO WHAT CONDITIONS?

ONTARIO MUNICIPAL ELECTRIC ASSOCIATION

The OMEA rejected the concept of interim cost awards. The OMEA was of the view that if criteria have been set for an award of costs at the conclusion of a hearing, they should serve as a catalyst for the improvement of intervenor participation. Each responsible intervenor would then be aware that a positive contribution would result in costs being awarded, and thus, interim costs would be unnecessary.

MR. FRANK HUBSCHER

Mr. Hubscher suggested that intervenors be funded in advance through a proposed independent Office of the Consumer's Advocate for the Board and the Ministry of Energy. Groups or individuals could apply to the Office for limited funding and would be required to meet certain criteria in order to be eligible for such funding.

ONTARIO HYDRO

Ontario Hydro was not in favour of cost awards in advance, or interim funding, for various reasons. First, if costs are awarded for contribution to the effectiveness of the hearing, then such effectiveness can only be assessed after the fact, and not before. Second, cost awards in advance are not necessary, since Hydro rate hearings have developed into thorough reviews with a good balance of interests and viewpoints. Third, Ontario Hydro questions the legal authority of the Board to award costs in advance under s. 28 of the OEB Act.

Ontario Hydro was of the view that advance funding should be a matter of government policy and government funding and should not be a charge to the power consumers of Hydro because effectively everyone in the province uses electricity, but not everyone uses gas.

ENERGY PROBE

Energy Probe did not advocate open-ended government funding as a means of redressing the

economic imbalance between public interest intervenors and commercial applicants, as such open-ended funding might undermine the independence of such interest groups.

However, Energy Probe advocated the awarding of interim costs for specific interventions to facilitate quality involvement by public interest groups who might otherwise avoid making certain expenditures because of cash flow concerns and the risk of not being compensated.

Energy Probe submitted that past attendances, reputation, other work of the group, and qualifications of proposed witnesses could give the Board guidance in approving such awards. Conditions could be imposed to assure that funds will not be wasted. A preliminary budget with estimates of time, expenses and witness fees could form the basis for such an award and gross deviation from the budget without Board approval would reduce the intervenor's chances

of gaining such funding in future. A final expense statement to be filed after the hearing could be required to eliminate the possibility of misallocation of funds. A contract could provide for return of funds not used in the hearing.

Energy Probe did not envisage requests for interim costs on a routine basis. Energy Probe maintained that other tribunals that award interim costs are not flooded with requests for such costs.

FLOWERS CANADA

Flowers Canada recommended that where the Board finds a financial need and considers particular research to be beneficial, it should provide costs in advance or conduct research on behalf of an intervenor.

MR. JAMES A. GIFFEN, Q.C.

Mr. Giffen maintained that the Board has sufficient power under the OEB Act to order the payment of interim costs, which could be on the same basis as interim costs awarded under the Ontario Business Corporations Act or the Canada

Corporations Act. However, if there is any doubt as to the power to award interim costs, Mr. Giffen recommended either a stated case before the Divisional Court, or an amendment to the OEB Act.

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

CELA differentiated between funding, costs in advance, and interim costs. CELA submitted that funding involves money up front that would not be taken back at the end of the hearing. Costs in advance are comprised of money awarded prior to the hearing and prior to expenditures being made, while interim costs involve money awarded at various stages throughout the hearing as the costs are incurred. Any interim award or award in advance could be taken back later if participation had not been found to be meaningful.

CELA maintained that interim or advance costs are necessary in some cases to ensure that public interest groups can participate in hearings. Whether interim or advance costs are

required would depend very much on the anticipated length and type of a hearing.

CELA argued that while the Manitoba Society of Seniors Inc. case held that preliminary cost awards were not authorized under the Manitoba statute, an Ontario Joint Board's recent interpretation of a cost award section almost identical to that of the Board's found the power to award costs in advance. CELA submitted that the Board should follow the reasoning of the Joint Board in the Hamilton Expressway Case and award costs in advance where appropriate. CELA recommended that if the Board is concerned about its jurisdiction, section 28 of the OEB Act should be amended.

CELA recommended that in order to receive interim cost awards, the intervenor should have to submit a detailed budget to the Board for approval. A full accounting would be made at the end of the hearing. CELA suggested that the Alberta Energy Resources Conservation Board and CRTC procedures providing for interim costs

would be useful models for the Board to consider.

INDUSTRIAL GAS USERS ASSOCIATION

IGUA opposed the awarding of costs in advance. IGUA maintained that such costs encourage participation for participation's sake rather than for the purpose of obtaining relief for the constituency affected. The resulting proliferation of interventions, rather than consolidating a broad public interest constituency would, in IGUA's view, tend to impede the efficiency of proceedings.

IGUA recommended that the Board should not follow the lead of the Joint Board which awarded costs in advance in the Hamilton Expressway Case. IGUA pointed out that encouraging increased participation through costs in advance could perhaps be more likely justified in the case of the Joint Board because, unlike the Board, the Joint Board lacks staff and Special Counsel to scrutinize applications.

FEDERATION OF NORTHERN ONTARIO MUNICIPALITIES

FONOM recommended that the Board award interim costs, because without such funding certain groups might not otherwise be able to participate.

FONOM submitted that the process used by the CRTC in making interim awards of costs may be a useful guide for this Board. The process should include a pre-hearing meeting to eliminate duplication and ensure that interventions will be meaningful and will meet the Board's criteria. The Board should also consider the previous track-record of an intervenor as to whether meaningful contributions have been made in the past.

FONOM maintained that if there is doubt as to whether the Board has the authority to award interim costs under s.28 of the Act, then the Board should enact a regulation under its general regulation-making authority to allow such awards. It suggested that enacting such a regulation would be preferable to amending the OEB Act.

UNION GAS LIMITED

Union submitted that the awarding of costs prior to or during the course of any proceeding or the use of costs to fund participants to any proceedings is inappropriate and is beyond the Board's powers.

Union also submitted that in light of s.14 of the Act which vests in the Board the powers, rights and privileges of the Supreme Court, the word "costs" in s.28 of the Act must be interpreted according to principles applied by the courts. The only concept of costs recognized in law is an award made at the conclusion of the proceeding.

Union also rejected the argument that s. 15(8) of the Act, which provides that the Board may make interim orders pending the final disposition of the matter before it, could allow the Board to make interim orders for costs.

NEW DEMOCRATIC PARTY CAUCUS

The NDP supported the awarding of interim costs and maintained that without interim costs it might be impossible for a citizen's group

to properly prepare and contribute responsibly at a hearing. The NDP recognized a danger of awarding interim costs, in that there is no guarantee as to how responsible a contribution the intervenor will make. However, the NDP urged the Board to adopt a flexible policy which acknowledges the necessity of advance funds where appropriate, as in the Joint Board's Hamilton Expressway Case decision.

The NDP suggested that a partial payment of costs in advance with the promise of further payment if the intervention is responsible, might solve the problem. The NDP suggested that taking back an interim award where a meaningful contribution has not been made is not a practical solution.

The NDP maintained that if there is doubt whether the Board has the power to award interim costs, then there should be an amendment to the OEB Act. The NDP preferred this procedure to a stated case to the courts on the matter.

CONSUMERS' ASSOCIATION OF CANADA (ONTARIO)

The CAC recommended that the Board award interim costs prior to or during a hearing to enable intervenors to prepare their cases effectively with the assistance of counsel and experts. The CAC recommended that the Board adopt a rule similar to that of the CRTC (section 45 of its Telecommunications Rules of Procedure) which provides for interim cost awards for intervenors who are likely to participate in a proceeding in a responsible way and who are expected to contribute to a better understanding of the issues by the Commission.

The CAC further recommended that if, at the conclusion of a hearing, the Board finds that a particular intervention has been frivolous and unhelpful, the intervenor could be put on notice that in future it would not receive an interim award and that any final costs award would be dependent on the quality of its intervention in that proceeding.

The CAC maintained that interim cost awards be provided by the applicant in rate proceedings and by the Board in policy-making hearings.

NORTHERN AND CENTRAL GAS CORPORATION LIMITED

Northern maintained that the Board should not make interim cost awards and that this would encourage the intervenor to participate responsibly throughout the hearing in order to be eligible for a cost award at the conclusion of the proceeding. To award interim costs would be a pre-judgement on the issue of costs by the Board. To award interim costs would also require policing by the Board to ensure that the intervenor fulfills the eligibility criteria and properly expends the award. Northern maintained that if the Board gets too involved in this process, the independence of the intervenor might be called into question.

INTER-CITY GAS CORPORATION - ONTARIO OPERATIONS

Inter-City recommended that interim costs not be awarded by the Board.

CONSUMERS FIGHT BACK

CFB maintained that it is practical and essential to provide for interim cost awards in the case of impecunious intervenors or intervenors with limited resources. This is especially important in longer cases and where extensive legal and expert assistance is necessary or unattainable without guarantees of payment.

CFB also maintained that there is merit in the general use of interim cost awards. CFB proposed a system of partial interim cost awards. It believed this system would be more practical in preventing such awards being wasted than the threat of having to repay such awards at the end of the hearing if the contribution had not been significant. Intervenors

could be awarded one-third of its estimate in advance. Such an award could be confirmed through an exchange of correspondence following the intervention statement, or at an early pre-hearing conference.

In the case of extended hearings, a brief midway examination of costs could be conducted, perhaps by Board Counsel and a further one-third award could be made available to the intervenor.

A final assessment could be made when the case had been concluded and with the remaining one-third as holdback, the Board could still deprive an intervenor of a very substantial portion of its costs should its intervention not meet expectations.

CFB maintained that the Board has the power to award costs on an interim basis on the grounds that: there is nothing in the OEB Act preventing such awards. It mentioned that recent case law (re Bell, re Green and Michaels as cited in the Board's bibliography in this

hearing) has shown that the courts recognize that regulatory agencies need not be bound by the approach to awards in civil litigation. The CFB stated that the power of the Board under s.15(8) of the OEB Act to make interim orders may cover interim cost awards. CFB suggested that if the courts rule that the Board cannot award costs on an interim basis, then an amendment to the OEB Act would be the only solution.

NORTH YORK HYDRO

North York Hydro opposed interim cost awards. However, if the Board should decide to make interim cost awards, then the Board has a responsibility to guard against waste. North York Hydro believed an effective method of ensuring against this is to finance all interim awards from funds of the Board. It also indicated that the awarding of interim costs one-third at a time seemed to be a reasonable safeguard.

North York Hydro was of the view that the Board does not have the power to award interim costs and that an amendment to the OEB Act would be necessary.

NO TOWERS FEDERATION

No Towers recommended that intervenors be awarded costs as they are incurred. The following procedure was proposed:

1. Intervenors should provide proposals to the Board, containing a statement of work, along with a rough schedule including "milestones", and an estimate of the costs involved in the proposal.
2. The Board would approve or disapprove of the proposals, based on a presentation by intervenors, as well as comments by the applicant, and cross-examination by the applicant and the Board.
3. If approved, the intervenor's proposal would be handled in the same way as any government contract, with periodic reviews at "milestones" defined on the schedule.

Payments would be dispensed to the intervenor as expenses (validated by the necessary paperwork) were incurred. The Board could determine that if progress was not being made according to the plan, it would suspend further funding for the proposal.

ISSUE 8: SHOULD COSTS BE DETERMINED IN ACCORDANCE WITH A FIXED SCALE (TARIFF), SUBJECT TO INDIVIDUAL DETERMINATION IN EACH CASE (TAXATION), SOME COMBINATION OF BOTH, OR SOME OTHER ALTERNATIVE?

ONTARIO HYDRO

Ontario Hydro recommended that the Board allow a reasonable per diem measure of costs in respect of the involvement of intervenor counsel and expert witnesses.

ENERGY PROBE

Energy Probe asserted that a tariff (with built-in cost of living escalation) would provide a convenient base for predictable cost awards. However, the tariff would merely provide a starting point in negotiations between the intervenor and the applicant, as an intervenor should be able to ask for market value. Where the parties could not agree on the quantum, then the matter should first be referred to Board Counsel and failing resolution, it should be resolved through some taxation mechanism involving the Board.

Energy Probe submitted that the tariff should allow for all receipted out-of-pocket expenses including experts' accounts, and for counsel fees (including preparation). Per diem rates should be set for the time spent by individuals or staff members of intervening groups on preparation or attendance as witnesses or self-counsel. All of these expenses, if seen as unreasonable in the circumstances, could be challenged by the applicant through the taxation mechanism.

MR. JAMES A. GIFFEN, Q.C.

Mr. Giffen recommended that both the costs of intervenors and utilities be taxed with detailed disclosure of all costs paid to counsel and experts. Rates for fees should be set on an hourly basis.

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

CELA submitted that a tariff should be established by the Board with a certain amount of flexibility built in (e.g. a range of counsel or expert fees). A tariff would provide

some certainty as to the range of costs that may be awarded. CELA recommended that in cases of dispute, any intervenor could have its account taxed by a person appointed by the Board and CELA envisaged that a Board staff official would act as taxing officer.

CELA suggested that costs for staff counsel be calculated on a per diem rate, and not on the basis of fair market value. CELA also maintained that experts and outside counsel costs be paid on a tariff basis, and not according to fair market value in order that there be a degree of certainty.

FEDERATION OF NORTHERN ONTARIO MUNICIPALITIES

FONOM recommended that costs should be taxed, such that an individual determination may be made in each case for each intervenor.

UNION GAS LIMITED

Union recommended that a bill of costs should be prepared after an award of costs in

accordance with the Supreme Court Tariff and submitted to the Board. Expenses should not be allowed to exceed the Tariff.

NEW DEMOCRATIC PARTY CAUCUS

The NDP recommended that the Board establish a taxing mechanism for assessing intervenors' statements of costs. Guidelines should be established to indicate which expenses would be considered legitimate.

CONSUMERS' ASSOCIATION OF CANADA (ONTARIO)

The CAC recommended that costs should be subject to individual determination in each case. The CAC suggested that in rate hearings the intervenor should submit a statement of costs to the applicant with a view to reaching an agreement on the total amount. If agreement is not reached, the issue would be resolved by the Board panel whose decision would be final and binding. The CAC suggested that in policy-making hearings the Board panel or the entire Board should have the responsibility for fixing and approving cost awards.

NORTHERN AND CENTRAL GAS CORPORATION LIMITED

Northern recommended that costs should be fixed in an amount by the Board panel hearing the particular proceeding at the conclusion of that hearing after submissions are made as to the amount sought and expenses claimed. Northern suggested that the amount allowed should reflect the extent to which the intervenor seeking costs has contributed to a better understanding of the issues by the Board.

INTER-CITY GAS CORPORATION - ONTARIO OPERATIONS

Inter-City recommended that an intervenor, if otherwise eligible for costs, should be paid costs reasonably incurred in intervening. Inter-City did not think it appropriate that the Board establish a schedule of hourly rates for counsel and expert witnesses. A lawyer or consultant's hourly rate is only part of the equation, total time spent, quality of work and contribution being of equal importance.

CONSUMERS FIGHT BACK

CFB submitted that an intervenor applying for an award of costs should be required to

provide an affidavit setting out its costs with sufficient particularity so as to enable the applicant utility and the Board to determine whether or not the expenses are reasonable. Copies of supporting invoices and a detailed calculation of fixed and overhead expenses, where applicable, should be included.

CFB recommended that awards should be on a solicitor-and-own-client basis, in order to allow sufficient freedom for useful and reasonable participation. CFB submitted that if the Board prefers to set a scale of costs, it should be one that will enable intervenors to attract experienced, competent counsel with skills comparable to those of counsel used by the applicant companies. The most appropriate rate would be on the scale of the Supreme Court of Ontario, with some leeway for the degree of active participation by counsel at the hearing. Alternatively, consideration might be given to an hourly rate, which is more common in cases requiring extensive preparation.

NORTH YORK HYDRO

North York Hydro maintained that neither a fixed scale nor taxation would appear wholly appropriate, but it is likely both would be necessary.

NO TOWERS FEDERATION

No Towers suggested that the Board approve proposals of intervenors' estimated costs in advance after hearing representations.

No Towers recommended that costs would then be awarded to intervenors (validated by the necessary paperwork) as expenses were incurred. Scheduled periodic reviews by the Board would permit a determination as to whether funding for the proposal should continue.

ISSUE 9: WHO SHOULD DECIDE TO WHOM COSTS ARE AWARDED; THE PANEL HEARING AN APPLICATION? OTHER BOARD MEMBERS? BOARD STAFF? PERSONS NOT CONNECTED WITH THE BOARD?

MR. FRANK HUBSCHER

Mr. Hubscher suggested that intervenors apply for funding to a proposed independent Office of the Consumers' Advocate for the Board and the Ministry of Energy. A decision of this Office on funding could be appealed to the Ombudsman.

ONTARIO HYDRO

Ontario Hydro submitted that the Board that is empowered to award costs and the awarding of costs should be left solely to the judgement of the Board. However, Hydro considered that the parties ought to have an opportunity to make submissions pro and con.

ENERGY PROBE

Energy Probe maintained that costs should be automatic unless challenged by the applicant utility. In the event of a challenge, the Board would hear argument but should apply the principle that the burden of disproof rests on the applicant utility.

FLOWERS CANADA

Flowers Canada suggested that costs in advance could be awarded by the Board after a preliminary hearing to determine whether or not proposed research would be beneficial and to determine the financial need of the intervenor.

MR. JAMES A. GIFFEN, Q.C.

Mr. Giffen appeared to be in favour of having cost awards decided by members of the Board, but also adopted the submissions of FONOM.

CITY OF KITCHENER

Kitchener submitted that the awarding of costs should be entirely within the discretion of the Board hearing an application.

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

CELA recommended that the panel of the Board hearing the application should decide whether the criteria for intervenor funding have been met. Disputes as to quantum would be referred to the Board's taxing officer who should be a Board staff official.

FEDERATION OF NORTHERN ONTARIO MUNICIPALITIES

FONOM submitted that the Board Members who heard the evidence should decide eligibility for cost awards in the first instance, and authorize a taxing officer to determine the quantum of such awards with a right of appeal to the Board.

UNION GAS LIMITED

Union recommended that the costs should be spoken to at the conclusion of a hearing before the panel hearing the application and should be addressed in the Board's decision. Once a bill of costs is submitted, it should be considered by that panel of the Board. The utility should be given an opportunity to comment on the appropriateness of the bill before the Board makes a decision. The costs finally awarded should then be the subject of a separate Board order.

CONSUMERS' ASSOCIATION OF CANADA (ONTARIO)

The CAC recommended that the Board panel sitting on a particular application should decide to whom costs are awarded, with the intervenor having the right to appeal an

adverse decision to the entire Board. The Board panel would also determine the quantum of costs in cases where the intervenor and applicant utility have not reached agreement on the total amount.

NORTHERN AND CENTRAL GAS CORPORATION LIMITED

Northern recommended that the Board panel hearing the particular proceeding should decide to whom to award costs. Northern believed the Board panel is best suited to decide the amount of the cost awards since, unlike a taxing Master, the panel is concerned with what should be included in the applicant utility's cost of service.

INTER-CITY GAS CORPORATION - ONTARIO OPERATIONS

Inter-City recommended that the decision on eligibility and the quantum of the cost award should be made by the panel hearing the application. Inter-City submitted that argument for eligibility and the statement of costs should be made as part of an intervenor's closing argument. The Board would make its decision

on eligibility prior to the issuance of its decision on the utility's application, so that the intervenor cost award could be reflected in the utility's approved revenue requirement.

CONSUMERS FIGHT BACK

CFB recommended that the Board panel hold a simple inquiry at the conclusion of the hearing to determine whether and to whom costs should be awarded. If awarded costs, an intervenor would then submit its affidavit of costs to the Board and the applicant utility would be allowed to make submissions in writing. Alternatively, a brief oral argument could be held in the presence of Board Counsel who would provide written reasons, appealable to the Board. CFB submitted that a full scale taxation should only be ordered by the Board in the case of serious inadequacies in the affidavit.

NORTH YORK HYDRO

North York Hydro maintained that if the "usefulness" criterion is used as a consideration in awarding costs, then the panel hearing an application is best qualified to decide to whom, and the degree to which, costs should be awarded. North York Hydro suggested that cost awards be decided in a hearing separate from and following the main hearing.

North York Hydro recommended that an appeal procedure be established to a body other than the Board, perhaps a court. North York Hydro opposed an appeal to the Board, because, in its opinion, Board panels are not noted for contradicting or reversing positions taken by other or previous panels.

NO TOWERS FEDERATION

No Towers recommended that the Board decide whether costs should be awarded to an intervenor at an early stage, periodically review the progress of the intervenor, and dispense money to the intervenor as expenses are incurred.

ISSUE 10: WHO SHOULD BEAR THE BURDEN OF SHOWING THAT COSTS SHOULD OR SHOULD NOT BE AWARDED IN A PARTICULAR CASE?

ONTARIO MUNICIPAL ELECTRIC ASSOCIATION

The OMEA's view was that those intervenors who seek and receive a cost award should be prepared to account for their expenditures and to demonstrate a purpose for each major item.

ONTARIO HYDRO

Ontario Hydro's position was that awards should be limited to those intervenors having financial need and that intervenors should be required to demonstrate to the Board that the effectiveness of their intervention was directly related to their reasonable expectation of a cost award.

ENERGY PROBE

Energy Probe claimed that applicants generally do not have to prove their costs and persuade the Board of the value of their application in order to receive costs (from their "subscribers"), and it argued that intervenors should not ordinarily be required to meet such tests.

Energy Probe submitted that so long as an application for costs is properly made with the necessary documentation, there should be a presumption that costs will be awarded with the burden of "disproof" resting with the applicant.

FLOWERS CANADA

Flowers Canada suggested that for an intervenor to receive costs in advance, it would have to demonstrate that the proposed research could ultimately benefit all parties and that it is in financial need.

MR. JAMES A. GIFFEN, Q.C.

Mr. Giffen recommended that the onus should be on the applicant utilities to show that the intervenors are not entitled to costs. However, Mr. Giffen also adopted the submission by FONOM.

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

CELA submitted that once an intervenor satisfies the criteria for the awarding of costs there should be a presumption, in a general sense rather than a legal presumption,

that costs will be awarded. An intervenor would be required to file an application for costs with necessary documentation. Thereafter, there would be a burden on the applicant to show that costs were not related to actual expenditures or were not warranted.

FEDERATION OF NORTHERN ONTARIO MUNICIPALITIES

FONOM recommended that intervenors be required to demonstrate that the Board's eligibility criteria have been met. The Board should require a written application setting out the reasons why costs should be awarded, having regard to the circumstances of the case and the criteria.

UNION GAS LIMITED

Union recommended that the burden should be on the person seeking costs to show that costs should be awarded in a particular case.

CONSUMERS' ASSOCIATION OF CANADA (ONTARIO)

The CAC maintained that the burden of proof rests with an intervenor to show that its intervention qualified for an award of costs.

NORTHERN AND CENTRAL GAS CORPORATION LIMITED

Northern submitted that the onus should be on the intervenor to show that it has satisfied the Board's eligibility criteria for cost awards.

INTER-CITY GAS CORPORATION - ONTARIO OPERATIONS

Inter-City submitted that argument for eligibility of costs should be made as part of an intervenor's closing argument.

CONSUMERS FIGHT BACK

CFB maintained that the onus should be on the intervenor to show that it should be awarded costs, so long as the criteria for awarding costs were reasonable.

NORTH YORK HYDRO

North York Hydro submitted that intervenors should be required to justify an application for and the costs being sought.

NO TOWERS FEDERATION

Although No Towers did not address this issue specifically, its suggestion that an

intervenor seeking interim costs would prepare and present a costs proposal to the Board for approval and periodic review does cover this issue.

ISSUE 11: WHAT SAFEGUARDS MAY BE NECESSARY TO AVOID COST AWARDS BEING WASTED, EITHER BY APPLICANTS OR BY INTERVENORS?

ONTARIO MUNICIPAL ELECTRIC ASSOCIATION

The OMEA recommended the adoption of regulations enacted by the Alberta Energy Resources Conservation Board which deny costs to otherwise eligible intervenors in certain circumstances which were set out under Issue 3.

It also noted that the APUB may refuse to pay fees to officials of intervenors, to compensate for time spent educating either the client or the lawyers, or to award costs for activities helpful to the intervenor solely for purposes other than the hearing in question.

MR. FRANK HUBSCHER

Mr. Hubscher did not address this issue specifically. However, he did mention that to be eligible for a costs award the intervenor must be expected to contribute to the hearing and be in financial need.

ONTARIO HYDRO

Ontario Hydro mentioned various safeguards:

1. Clearly defined eligibility criteria based on whether the intervenor made an effective contribution and the financial need of the intervenor.
2. In extreme cases of wasteful or repetitive participation, costs could be awarded against an intervenor.
3. Streamlining of interventions by having customer-representative groups (for example OMEA, AMPCO, ONGA) represent the interests of their respective constituencies, and streamlining of interventions by encouraging groups of individuals without lawyers to seek representation through Special Counsel.

ENERGY PROBE

Energy Probe maintained that costs should only be denied if the Board is persuaded that a particular intervention was frivolous or otherwise irresponsible.

Energy Probe stated that the Board should not, in the absence of irresponsible behaviour,

engage in weighing the value to the Board of the intervention as a means of determining appropriateness of costs.

Energy Probe maintained that it is inconceivable that a public interest group would intervene without some basis of support from the population for its views and that these views should be respected.

Energy Probe argued that the proposed safeguards surrounding interim costs, along with a tariff, should guard against excessive spending. The tedium and length of the hearing process is perceived to provide ample protection from marginally interested parties who might unduly delay the hearing and waste costs. Moreover, problems due to unduly repetitious interventions can be met by the Board's control of its own process, for example the limitation of repetitious cross-examination and the amalgamation of similar interrogatories.

FLOWERS CANADA

Flowers Canada suggested that the Board could determine from the initial presentation of the intervenor whether research would be beneficial and could then award sufficient funds to develop the needed research or carry out the research internally.

MR. JAMES A. GIFFEN, Q.C.

Mr. Giffen adopted the submission of FONOM which recommended that intervenors submit documented applications for cost awards.

CITY OF KITCHENER

Kitchener did not address this issue specifically. However, it did mention that to be eligible for costs an intervenor must have made an essential or substantially useful contribution to the hearing.

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

CELA mentioned a number of safeguards to prevent cost awards from being wasted:

1. Without a substantial contribution to the proceedings or acting responsibly, costs would not be awarded.

2. Costs would not be awarded if the intervention was frivolous or vexatious. By "frivolous or vexatious" CELA would include an intervention that took an inordinate amount of time on non-central issues or matters that the Board considered irrelevant.
3. Full accounting and documentation.
4. To avoid duplication, intervenors with similar cases might be required to make one presentation or divide between them the experts' and lawyers' costs.
5. A pre-hearing conference could determine the nature of the evidence that is to be presented by intervenors to avoid overlapping witnesses.

INDUSTRIAL GAS USERS ASSOCIATION

IGUA suggested that responsible participation by intervenors could be encouraged by the possibility of awarding of costs against intervenors where appropriate.

FEDERATION OF NORTHERN ONTARIO MUNICIPALITIES

FONOM recommended a documented application from the intervenor both with respect to requests for post-hearing cost awards and for interim awards. Such documentation would be supported by appropriate affidavits, undertakings and representations in an effort to avoid the wasting of cost awards.

UNION GAS LIMITED

Union mentioned various safeguards to avoid costs being wasted:

1. The Board should deny intervenor status where a number of persons seek to intervene and their interests can be adequately represented by Board staff and counsel or other intervenors.
2. Costs should be awarded against an intervenor who substantially and unnecessarily prolongs the length of the proceedings by dealing with irrelevant issues and conducting unnecessary cross-examination.
3. The person seeking costs should bear the burden of showing that costs should be awarded.

4. The bill of costs should be prepared in accordance with the Supreme Court of Ontario Tariff.

5. The person seeking costs should submit a bill of costs to the Board to be considered by the panel hearing the application. The party against whom costs are awarded should be afforded an opportunity to comment on the appropriateness of the bill before the panel's decision.

NEW DEMOCRATIC PARTY CAUCUS

The NDP mentioned a number of safeguards to avoid costs being wasted:

1. Clear eligibility guidelines should be devised by the Board and incorporated into a statement of government policy for all to see.

2. The Board should require that citizens' groups with essentially the same interest coordinate their presentation and share a cost award. The NDP suggested that staff

discussions with intervenors once they have indicated they are going to make a presentation, rather than a pre-hearing conference, would ensure this coordination.

3. The Board should make only partial interim cost awards with the promise of further cost awards only for responsible contributions at the hearing to prevent the wasting of interim cost awards.
4. The Board should deny costs where an intervention is frivolous or vexatious.
5. Guidelines would establish what expenses are legitimate. There would be a mechanism for reviewing intervenor's statements of costs.

CONSUMERS' ASSOCIATION OF CANADA (ONTARIO)

The CAC maintained that should the Board adopt a policy of making cost awards for intervenors, a record of decisions would then be developed which would indicate to intervenors whether their planned intervention would qualify for a cost award.

The CAC stated that it is difficult to determine whether the amounts expended by an applicant in a rate proceeding have all been necessary and efficiently allocated and is unable to recommend a procedure to ensure this is the case.

NORTHERN AND CENTRAL GAS CORPORATION LIMITED

Northern stated that various safeguards to prevent costs being wasted were needed:

1. Clearly defined eligibility criteria, including the intervenor's contribution to a better understanding of the issues by the Board and demonstrated financial need.
2. The holding of a pre-hearing conference for the purpose of attempting to avoid duplication of representation at the hearing.
3. The denial of costs for a frivolous intervention. This safeguard may be necessary in addition to the holding of a pre-hearing conference.

4. The Board panel could control its process and prevent intervenors from dealing with irrelevant issues.

INTER-CITY GAS CORPORATION - ONTARIO OPERATIONS

Inter-City recommended that a pre-hearing conference be held to determine if there is duplication of effort by intervenors and, if so, to eliminate such duplication.

CONSUMERS FIGHT BACK

Various safeguards to prevent costs being wasted were set out:

1. Clearly defined eligibility criteria with emphasis on the contribution of the intervenor to the hearing.
2. The onus on intervenors to consult before a hearing to avoid duplication of effort. CFB did not think it necessary that a formal pre-hearing conference be held, but had no objection if one was required.
3. An interim cost awards scheme could award costs partially, before the hearing,

during the hearing and at the end of the hearing. CFB believed that the fact that the intervenor may be penalized for lack of contribution in the middle or latter part of the proceedings is a good control.

4. As long as there are reasonable criteria for awarding costs the onus would be on the intervenor and if the Board found the intervenor's affidavit and bill of costs inadequate, then it would be returned for further documentation. The applicant company could make submissions in writing setting out any objections.

NORTH YORK HYDRO

North York Hydro suggested some safeguards to prevent costs being wasted:

1. Cost awards limited to intervenors who have made a recognizable, useful contribution at the hearing.
2. A pre-hearing conference to allow for the identification or presentation of issues and appropriate expertise necessary to

accomplish the Board's responsibility in the most effective and least costly manner. North York Hydro favours the joining together of groups for the purpose of intervening.

3. The awarding of costs to applicants when they have been put to unnecessary expense by intervenors.
4. The right to appeal a cost award to a body other than the Board.

NO TOWERS FEDERATION

No Towers maintained that the Board should award costs to an intervenor as expenses are incurred. The Board would review periodically an intervenor's progress and if not satisfied, it could suspend further funding for the intervention.

ISSUE 12: WHAT PROCEDURES SHOULD BE USED TO ENABLE THE BOARD TO DECIDE COSTS QUESTIONS EFFICIENTLY BUT FAIRLY?

MR. FRANK HUBSCHER

Mr. Hubscher proposed that intervenors be funded in advance through an independent Office of the Consumers' Advocate for the Board and the Ministry of Energy. Groups or individuals would apply to the Office for limited funding with a right of appeal to the Ombudsman.

ENERGY PROBE

Energy Probe suggested that where a challenge is made by an applicant to the appropriateness of a cost award before the Board (as opposed to the appropriateness of a particular expense by way of taxation), the Board should treat the matter as a formal motion, requiring written reasons, and thereby provide guidance for future cost awards and allow for review.

Energy Probe recommended that taxation of costs could be handled by one member of Board staff in cases where Board Counsel has not been able to facilitate a settlement.

FLOWERS CANADA

Flowers Canada submitted that in order to obtain costs in advance an intervenor must attend an initial Board hearing and demonstrate both financial need and the worthiness of proposed research.

MR. JAMES A. GIFFEN, Q.C.

Mr. Giffen did not address this issue. However, he adopted the submission of FONOM.

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

According to CELA, the combination of the use of established criteria for funding, the filing of a detailed application for costs, a tariff and the opportunity for taxation, should enable the Board to decide cost applications efficiently without the need to spend an excessive amount of time hearing arguments on the cost issues.

FEDERATION OF NORTHERN ONTARIO MUNICIPALITIES

FONOM maintained that the filing of written submissions with the Board and the Board authorizing attendance by the intervenor before a taxing officer to determine the quantum of such awards, would assist the Board

in deciding cost questions effectively and equitably. There would be a right of appeal to the Board from the taxing officer.

UNION GAS LIMITED

Union recommended that the panel hearing an application should hear arguments on costs at the conclusion of the hearing and should address the issue in its decision. Where costs are awarded, a bill of costs should be prepared by the person awarded costs and submitted to the Board. The bill should be prepared in accordance with the Supreme Court Tariff, and should be considered by the panel hearing the application as they are in the best position to make an assessment. The applicant should be given an opportunity to comment on the appropriateness of the bill before the Board makes a decision. The actual costs awarded should then be the subject of a separate Board order.

NEW DEMOCRATIC PARTY CAUCUS

The NDP did not address this issue in detail. It envisaged the Board deciding whether costs should be awarded in the first place, and an intervenor then submitting a statement of costs which would be assessed by a mechanism to be established by the Board.

CONSUMERS' ASSOCIATION OF CANADA (ONTARIO)

The CAC recommended certain procedures for the Board to use in deciding cost questions. Prior to a hearing the Board should:

1. Develop and publish policy guidelines for cost awards to intervenors and circulate these guidelines to parties known to have an interest in this subject.
2. Ensure that information relative to the Board's policy on costs is included in all notices of public hearings.

During a hearing the Board should:

1. Entertain requests for interim cost awards and decide same.

2. Evaluate the content of intervenors' briefs, the thoroughness of preparation and the relevance of cross-examination.
3. Consider the issues raised by an intervenor and their importance to an improved understanding of the implications of the applicant's case on its customers.
4. Make cost awards for intervenors on a generous basis in order to encourage public participation in the hearing process. At the same time, reject applications for cost awards where the intervenor has not been responsible.

NORTHERN AND CENTRAL GAS CORPORATION LIMITED

Northern recommended that costs be fixed in an amount by the Board panel hearing the particular proceeding at the conclusion of the hearing after submissions have been made. The submissions would be as to the amount sought and expenses claimed. The amount allowed should reflect the extent to which the intervenor seeking costs has contributed to a better understanding of the issues by the Board.

INTER-CITY GAS CORPORATION - ONTARIO OPERATIONS

Inter-City recommended that argument for eligibility and the statement of costs should be made as part of an intervenor's closing argument. The Board would then be obligated to make a decision on eligibility prior to the issuance of its decision on the company's application so that any intervenor cost award could be reflected in the applicant's approved rate base and revenue requirement.

CONSUMERS FIGHT BACK

CFB recommended that the Board should hold a relatively simple inquiry at the conclusion of the hearing to determine whether costs should be awarded and to whom. CFB maintained that it is preferable for the decision to be made at that time, when the contributions of the various parties are still fresh in the minds of the panel members.

It recommended that to apply for a final award of costs, an intervenor should submit an affidavit setting out what its costs have been with substantial particularity so as to enable

the applicant and the Board to determine whether or not these expenses appear reasonable. It should include copies of supporting invoices where available and a detailed calculation and apportionment of fixed and overhead expenses where applicable.

CFB believed that taxation should not follow as a matter of course after an award of costs. If the intervenor's affidavit and bill of costs is inadequate in the eyes of the Board, it should be returned for the provision of further appropriate documents. CFB recommended that the applicant make submissions in writing, setting out any objections, with reasons, as to the level of the costs or as to particular items. Alternatively, a brief oral argument could be held in the presence of Board Counsel who would provide written reasons, with appeal to the Board. CFB submitted that in the absence of a serious concern as to facts contained in the affidavit or bill, the expense and delay of a full-scale taxation and

cross-examination on costs should not be ordered by the Board.

NORTH YORK HYDRO

North York Hydro maintained that if a "usefulness" criterion is a consideration in awarding costs, then the panel hearing an application should decide the award of costs. It suggested that the intervenor be required to justify its application for costs in a hearing, separate from and following the main hearing.

NO TOWERS FEDERATION

No Towers recommended that intervenors normally be awarded costs as they are incurred and that equal amounts of money be provided for the applicant and intervenors. The procedure it proposed for handling cost awards in a fair and balanced manner is set out under Issue 7.

CHAPTER IV - CONCLUSIONS OF THE BOARD BY ISSUES

ISSUE 1: FOR WHAT REASONS SHOULD COSTS BE AWARDED TO INTERVENORS?

While this Board may have been reluctant in the past to adopt specific procedures for the awarding of costs to intervenors, a general move has been evident for some time towards a more liberal interpretation of the Board's discretion under section 28 of the OEB Act.

The Board believes it should have available to it a broad range of opinions and information for its decision-making. Hearings before the Board are becoming increasingly complex. In such circumstances the Board considers that in fulfilling its duty towards the public interest, which is implicit in the OEB Act, there is an increasing need to ensure that a broad range of interests is represented at the Board's hearings and that the essential points are canvassed in sufficient depth to

develop a record that will provide the maximum assistance to the Board.

Removal of the financial barrier to meaningful intervention on the part of interests having genuine concerns would, in the Board's view, enhance public awareness of and confidence in the regulatory process. Furthermore, without the informed intervention that the Board sees as necessary, there is a real danger that rate hearings will become non-representative of all of the interests which the Board should consider in reaching decisions. The Board is not interested in the quantity of interventions per se; rather it seeks to provide a forum in which balanced representations can be received from those who have something of value to contribute to the hearing. The Board has concluded that intervenors making such contributions should be recognized through the awarding of costs.

The Board does not accept the views of some participants that the prospect of cost

awards will encourage parties to intervene even though their interest may be limited, nor that cost awards will encourage frivolous or vexatious interventions. If, however, such interventions should occur, the Board believes it can control them. Moreover, by adopting a policy of awarding costs more regularly, the Board does not guarantee an award of costs to any particular intervenor.

The Board considers that awarding costs to intervenors will not necessarily prolong the hearings. While the overall cost of hearings may increase initially, the additional cost will be worthwhile if the overall objective of improving the flow of information for decision-making purposes is achieved. Probably the most compelling rationale for cost awards is that it should encourage the flow of high quality, helpful information to the Board.

ISSUE 2: IN WHAT KINDS OF PROCEEDINGS SHOULD COSTS BE AWARDED?

The types of proceedings most often before the Board are:

- rate applications, either directly from gas utilities, or by reference in the case of Ontario Hydro;
- franchises, certificates of public convenience and necessity, and leave to construct facilities;
- policy-making or generic hearings dealing with specific issues; and
- the transfer of ownership of a gas utility.

Some participants suggested that the Board should not distinguish between these types of proceedings in determining whether costs should be awarded. Some thought costs should be awarded only in extraordinary hearings and others recommended costs be awarded in all but generic or policy-making hearings.

In each type of proceeding the Board is required to test fully the information provided by the participants during the hearing and in each case intervenors can play a major role in contributing to the Board's understanding of the issues.

The Board has decided, therefore, that subject to the limitation indicated in the conclusions under Issue 5, there should be no distinction among the different types of proceedings and cost awards may be made in any proceeding before it.

ISSUE 3: WHO SHOULD BE ELIGIBLE/INELIGIBLE FOR COST AWARDS?

The Board does not believe that the awarding of costs should be limited to intervenors in financial need and accepts the City of Kitchener's view that, in the awarding of costs, a substantial contribution to the Board's understanding is a more relevant factor than that of financial need.

Furthermore, the Board sees it as extremely difficult, if not impossible, to determine clearly whether intervenors are financially needy. The Board accepts that in some cases if intervention is a genuine priority the intervenor will find the money, but considers that there are other cases where this does not occur.

It is recognized that an intervention has been, and presumably will continue to be, a matter which may be more easily afforded by some intervenors, such as industry associations

or industrial users, that have relatively narrow self-interests to address in an intervention. On the other hand, it would be wrong to suggest that simply because such groups are self-interested, they do not contribute to the better understanding of wider issues, to the benefit of the more general customer interest.

In this connection, it was suggested to the Board that the current policy of the APUB be adopted, whereby intervenors are considered eligible for cost awards if the intervention has been effective in testing the applicant's case to the benefit of all customers, and not merely directed to benefits which would flow to the intervenor or its associated customer class. In this vein, several participants suggested that major customers seeking direct economic benefits should not be awarded costs.

Against these differing viewpoints and recognizing that determining precisely whether

an intervention is directed beyond self-interest towards more common ground can be a difficult task, the Board has concluded that an intervenor will not be required at this time to demonstrate financial need, nor that its intervention goes beyond narrow self-interest, in order to be eligible for a cost award.

However, financial need, direct economic benefits obtained, and the self-interest involved are all factors that the Board will take into account in exercising its discretion to award costs and it will weigh these in conjunction with the contribution made by the intervenor in determining the proportion of costs to be awarded.

Several participants suggested that costs not be awarded to municipalities that have the power to pass on the costs of intervention through taxation or user charges. The Board is, however, persuaded by the submission of

FONOM that it may be inequitable that non-gas-consuming taxpayers of municipal intervenors should have to contribute through municipal taxes towards the cost of advancing the interests of gas-consuming citizens. The Board also understands the reluctance of municipalities to levy additional taxes in order to fund interventions at the Board and, therefore, will not exclude municipalities from eligibility for cost awards.

The Board accepts the view of most participants that the principal criterion for awarding costs to an intervenor should be the degree of assistance provided by that intervenor to the Board in examining the evidence and supporting any contrary positions or proposals.

The Board has reviewed all the eligibility criteria suggested by the participants and has concluded that it can establish considerations by which the Board will be guided as a general

rule in the exercise of its discretion to award costs to intervenors. Awards may be made to an intervenor who:

a) has or represents a substantial interest in the proceeding to the extent that the intervenor or those it represents will be affected beneficially or adversely by the outcome;

b) participates responsibly in the proceeding; and

c) contributes to a better understanding of the issues by the Board.

ISSUE 4: FOR WHAT KINDS OF EXPENSES SHOULD COSTS BE AWARDED?

Some participants suggested that specific expenses be considered in an award of costs, while others submitted that all expenses which were reasonably incurred and necessary for the preparation and presentation of a meaningful intervention should be allowed.

The Board has concluded that all kinds of expenses that have been legitimately incurred in the preparation and presentation of an intervention should be considered in an award of costs. The following are the kinds of expenses that should be considered:

a) counsel fees (both "in-house" and external);

b) fees of expert witnesses including preparation and presentation;

c) consultants' fees;

d) an honorarium at a per diem or pro rata

rate for individuals preparing and appearing on their own behalf or on behalf of a group;

e) staff time spent in preparation and presentation;

f) disbursements reasonably incurred and receipted, relating to the proceedings; and

g) transcript and photocopying costs.

The costs for which an award is sought, however, must be reasonable in the circumstances and must have been incurred directly and necessarily for the purposes of the proceedings.

ISSUE 5: WHO SHOULD PAY COSTS AND UNDER WHAT CIRCUMSTANCES?

The majority of participants favoured the payment of intervenors' costs by the applicant. A few participants recommended that under certain circumstances costs should be awarded against an intervenor, for example, if the intervention was frivolous or vexatious. It was also the view of some, that in respect of policy and generic hearings, costs should be paid out of Board funds allotted to it by the government for such purposes.

The Board has concluded that, generally, any cost awards resulting from proceedings before the Board should be borne by the applicant, including Hydro for references under s.37 of the OEB Act. In cases where an intervention is frivolous or vexatious, the Board may consider awarding costs against an intervenor.

With respect to generic hearings, which are special types of proceedings without an

applicant, the results may be of benefit to the gas utilities or Hydro as well as to intervenors. Similarly, in references where there is no specific applicant, the issues to be reviewed are usually of interest to and may affect many, if not all, of those associated with the regulatory process. In these cases, ordering costs to be paid by customers of the utilities would generally not be justified.

Nevertheless, there may be instances where a particular participant or type of participant stands to benefit from a generic hearing or a reference and the Board in exercising its discretion may require such a participant to pay costs.

In the Board's opinion, however, in keeping with its conclusion in Issue 2, there should be no distinction among the several kinds of proceedings in which costs should be awarded and thus participants in generic hearings and references should be entitled to cost

awards if they meet the criteria and if funds are available.

It is the Board's preference that such cost awards be made from budgeted funds allotted by the Government of Ontario. However, until such time as the appropriate recommendation to government has been made and approved, no cost awards will be made to participants in generic hearings or references except in the circumstances described above.

The Board will continue to charge its costs of a proceeding to an applicant utility and in a reference or generic hearing where a participant obtains benefits or relief of some nature, the Board may exercise its discretion to recover its costs from those who benefit.

ISSUE 6: SHOULD THE APPLICANT'S COSTS BE TREATED THE SAME AS, OR DIFFERENT FROM, INTERVENORS' COSTS?

As noted in the Introduction, there may have been some confusion as to the meaning of this Issue. A number of participants responded that, in the event of an unjustified or unnecessarily prolonged application, the applicant's customers should not bear the costs. Others felt that intervenors who make frivolous or vexatious interventions should pay the applicant's costs. These are really responses to Issue 5. Another participant submitted that there should be a tariff with a range of fees applicable to both intervenors and applicants. This is really a response to Issue 8.

Nevertheless, the submissions as a whole were sufficient to enable the Board to draw a conclusion with respect to this Issue which has been interpreted to mean "Should applicants' and intervenors' costs be treated by the OEB in the same way?"

In the interests of creating a more equitable system for all parties, the Board will continue to examine all of the costs of applicant utilities, including the costs of proceedings before the Board, and will disallow those found not to be prudent nor necessary and, as well, will examine documentation in the same way as for intervenors who have been found eligible for costs.

ISSUE 7: SHOULD INTERIM COST AWARDS BE MADE AND, IF SO, SUBJECT TO WHAT CONDITIONS?

At the hearing several participants addressed the issues raised in the Joint Board decision in the Hamilton Expressway Case. The application for judicial review of this decision was scheduled to be heard in the Divisional Court and the legal issues under review were of relevance to this proceeding.

In view of the submissions received from participants in this proceeding and the Board's desire to clarify if it has the jurisdiction to make interim awards in the future in appropriate circumstances, the Board stated a case under section 31 of the OEB Act which was heard in mid-April, at the same time as the judicial review of the Joint Board's decision.

During the course of the Divisional Court hearing, the Board amended its stated case to provide greater clarity. The Board put the

following question of law in its amended stated case:

> "Can the Board lawfully order interim costs to be paid in accordance with the following criteria and procedure:
>
> 1. Within 30 days of an application to the Board for an order or a recommendation with respect to the rates of any public utility coming within the jurisdiction of the Board, or of the announcement of any other public hearing by the Board, an intervenor or would-be intervenor may apply to the Board for an interim award of costs if he
>
> a) has, or is representative of a group or class of customers which has, a direct or indirect interest in the outcome of the proceeding of such a nature that the intervenor or other party may receive a benefit or suffer a detriment as a result of the order or recommendation made following the proceeding;
>
> b) can demonstrate to the satisfaction of the Board that he can contribute to a fuller and more fair hearing of the issues by the Board;
>
> c) undertakes to participate in a responsible way; and

d) can satisfy the Board that he does not have sufficient financial resources available to participate effectively in the proceeding in the absence of an award of costs under this section.

2. On receipt of an application made under subsection (1), the Board may direct that an interim award of costs be made to the applicant on such terms as it considers reasonable, and the regulated company shall, forthwith, pay to the person the amount set out in such award.

3. A person who receives an interim award of costs under subsection (2) shall file an application for costs within 30 days of the conclusion of the public hearing and, in addition, shall file:

a) documentation that demonstrates that he has fulfilled all the undertakings and representations made in support of the application for interim costs; and

b) where the amount of costs applied for differs from the amount of the interim award, financial documentation to support the application.

"Interim Costs" is defined as a contingent award of costs made at any time after the filing of an application with the Board, but before the delivery of the final decision by the

> Board, such award to be used only for fees, counsel fees and expenses and under the supervision and control of the Board."

Because the issue of interim cost awards is before the courts, the Board has concluded that it would be inappropriate to make any decision at this time on interim costs. The Board will, therefore, defer its decision as to the circumstances under which it would consider awarding interim costs if it had the jurisdiction, and on whether the Board would seek amending legislation if proved necessary by the Divisional Court's decision, until after it has been handed down and reviewed by the Board.

ISSUE 8: SHOULD COSTS BE DETERMINED IN ACCORDANCE WITH A FIXED SCALE (TARIFF), SUBJECT TO INDIVIDUAL DETERMINATION IN EACH CASE (TAXATION), SOME COMBINATION OF BOTH, OR SOME OTHER ALTERNATIVE?

There was no consensus among the participants as to which method was the most appropriate for determination of the quantum of cost awards. Only Ontario Hydro and Union recommended the use of a tariff or fixed scale without also specifying some sort of taxing mechanism. The method of setting costs supported by the largest number of participants was by individual determination in each case (taxation). Most of those who sought a combination of tariff and taxation methods also sought a certain amount of flexibility in the tariff.

A number of participants suggested that an intervenor, if otherwise eligible for costs, should be paid costs reasonably incurred in effecting its intervention. A tariff, however, was seen by some as providing some certainty as to the range of costs that might be awarded.

The Board has concluded that guidelines should be established which would contain a tariff with ranges for fees and other levels of costs which the Board considers appropriate to be used in the evaluation of intervenor costs.

The tariff will set, for example, the acceptable range of rates for preparation and hearing attendance of legal counsel and experts. Reimbursement will also be established for the time spent by staff members of intervening groups or by individuals on preparation or attendance as witnesses or self-counsel or as "in-house" counsel. The tariff will be intended to provide for both a degree of certainty as to allowable expenses and efficient and timely processing of the cost applications.

Until the Board has sufficient experience with the awarding of costs, however, all intervenor costs will be taxed. At some future date the guidelines containing the tariff referred to above will be issued and the costs of an

intervenor will then be determined by a combination of a tariff and taxation.

The Board will establish a taxation process that will take place after eligible intervenors submit their statement of costs. Initially intervenors will prepare a statement of costs in accordance with actual expenditures, but subsequently these should be prepared in accordance with the guidelines when issued. This taxation process is described under the conclusions of Issues 9 and 12.

Taxation is intended to ensure that costs have been reasonably incurred, are related to the matter before the Board, and are supported by documentation. If statements of costs are properly prepared in accordance with the guidelines, then taxation need not be a lengthy nor complex process.

In summary, the tariff in the guidelines, when issued, should provide some consistency and certainty in cost awards, yet the taxation process will allow for flexibility in making an individual determination in each case.

ISSUE 9: WHO SHOULD DECIDE TO WHOM COSTS ARE AWARDED; THE PANEL HEARING AN APPLICATION? OTHER BOARD MEMBERS? BOARD STAFF? PERSONS NOT CONNECTED WITH THE BOARD?

All of the participants who addressed this issue recommended that the Board panel hearing a utility's application should first decide eligibility for cost awards. There were differing opinions as to who should then set the quantum of costs. Some suggested the Board panel should also determine the quantum of costs as it would be most concerned with what should be included in the applicant utility's cost of service, while others recommended that the quantum of costs be referred to a taxing officer who should be a Board official. Board Counsel was mentioned by CFB as the appropriate Board official to assume the role of taxing officer.

A few participants suggested that a process for determining the quantum of costs should only be utilized if the intervenor and

applicant cannot reach agreement on the total amount. Those who addressed the question of appeals of cost decisions either suggested that the decision of the taxing officer could be appealed to the Board or, if the Board panel were to decide on the quantum of costs, an appeal would lie to the entire Board. North York Hydro, however, suggested that an appeal from a panel of the Board should lie elsewhere than to the full Board.

The Board has concluded that the panel hearing an application should decide on an intervenor's eligibility for an award of costs and also the proportion of costs to be awarded. The Board could, for example, find that an intervenor had met the criteria and was eligible for costs, but that its contribution to a better understanding of the issues was such that the Board would allow less than 100 percent of its reasonably incurred costs.

After the panel of the Board has determined whether an intervenor is eligible for costs and what proportion of its costs should be allowed, the intervenor would then submit a statement of costs to the Board for taxation. The Board has decided that it will authorize its Board Solicitor (referred to as Board Counsel by some participants) to act as a taxing officer (the "Taxing Officer") to make a recommendation on the quantum of costs to the Board panel that heard the utility's application. In the event that the Board Solicitor has acted as Special Counsel (the representative of the public interest) in a proceeding, the Board will authorize another Board official to act as Taxing Officer.

An objection to the Taxing Officer's recommendation may be made to the Board panel and a hearing may be held for that purpose, if so requested, or if required by the Board. A cost order will then follow.

ISSUE 10: WHO SHOULD BEAR THE BURDEN OF PROOF THAT COSTS SHOULD BE AWARDED?

Most participants stated that the burden of proof was upon the intervenor to show entitlement to costs.

Energy Probe and Mr. Giffen submitted, however, that the onus should be on the applicant to establish that an intervenor is not entitled to costs. CELA submitted that once an intervenor had demonstrated that it had satisfied the criteria for the awarding of costs, the burden should shift to the applicant utility to show that costs were not related to actual expenditures or were not warranted.

The Board has concluded that it will be the responsibility of the intervenor to satisfy the Board that it has met the criteria established by the Board for the awarding of costs. An intervenor will be expected to make submissions in its final argument demonstrating that it has met the criteria fully.

In addition, the Board has decided that the onus will also be on the intervenor to demonstrate by submissions and supporting documentation that its expenditures are reasonable in the circumstances and have been incurred directly and necessarily for the purpose of the proceeding.

ISSUE 11: WHAT SAFEGUARDS MAY BE NECESSARY TO PREVENT COSTS BEING WASTED EITHER BY THE APPLICANTS OR INTERVENORS?

A number of participants suggested that the Board should deny costs or even award costs against an intervenor in circumstances where an intervention was either: unnecessary, irrelevant, improper, intended to delay, repetitive, frivolous, irresponsible, or vexatious.

Many of the participants felt that clearly defined eligibility criteria promulgated by the Board would provide a useful safeguard against such abuses and that costs applications supported by appropriate documentation and representations would assist in avoiding wasting of cost awards.

A number of the participants mentioned that a pre-hearing conference should be held to determine the issues in order to avoid duplication and overlapping. In addition, some participants felt that by making partial payment of interim cost awards to intervenors, the

Board could monitor the effectiveness of each intervention and penalize an ineffective contribution. It was also stated that the Board should control its own process and prevent intervenors from irrelevant participation.

The Board has concluded that the following safeguards will be utilized:

1. A pre-hearing conference will be held, if deemed appropriate, in order to determine the issues participants intend to pursue and to prevent duplication of effort.
2. An intervenor found to meet the Board's eligibility criteria will be awarded only costs which are reasonable, necessary, and directly related to the proceeding. Clear accountability and supporting documentation will be required of the intervenor for each expenditure.
3. Frivolous or vexatious interventions will be precluded by the Board panel hearing an application, as will the introduction of

repetitive and irrelevant matters. The Board may deny costs to an intervenor who attempts such activity and may, in its discretion, consider awarding certain costs against such an intervenor if disregard for the Board's rulings is persistent.

4. The Board will establish guidelines and general procedures for an application for costs, as described in the conclusions under Issue 12.

ISSUE 12: WHAT PROCEDURES SHOULD BE USED TO ENABLE THE BOARD TO DECIDE COSTS QUESTIONS EFFICIENTLY BUT FAIRLY?

The view of most of the participants as to an appropriate procedure was summarized by CELA, which suggested that a combination of criteria for determining eligibility, a detailed application for costs based on a standardized tariff or guidelines and the opportunity for taxation should enable the Board to decide cost applications efficiently and fairly.

The procedure suggested for the different aspects of this process varied slightly among the participants. Several, such as Mr. Hubscher, Flowers Canada, and No Towers Federation, restricted their comments to funding through a separate office, awards in advance for research, or cost awards as costs are incurred. The Board will not comment on these suggestions while the matter of jurisdiction to award interim costs is before the Divisional Court.

The CAC recommended that the Board develop and publish policy guidelines for cost awards and include that information in all notices of public hearings.

Other participants' suggestions for procedures to establish eligibility and determine the quantum of costs have been discussed and decided under other Issues. The Board's conclusions, however, will be summarized under this Issue.

The Board has reviewed all of the participants' procedural suggestions under each of the twelve Issues and has reached the following conclusions, including those on procedures from other Issues:

1. The Board will develop and publish guidelines on cost awards, to be issued in due course and updated from time to time. These will include the eligibility criteria, the categories of recognized expenses, a tariff, and the detailed procedures

for applying for cost awards, some of which are outlined in this Report.

2. For hearings where the Board finds it appropriate, it will issue a procedural order inviting all participants to attend a pre-hearing conference. Intervenors will be required to submit a list of issues which they intend to address and to demonstrate that appropriate steps will be taken to eliminate duplication of effort. It may be possible to divide some issues amongst the intervenors or to bring a number of interests together within one representative group.

3. An intervenor must apply to the Board for costs and may give notice at the beginning of the hearing that it intends to seek costs or wait until final argument to make the request or apply in writing at any time.

4. Intervenors and the applicant will address the issues of eligibility for cost awards

and the proportion to be awarded in their final argument.

5. Within 10 working days of the release of the Board's decision or of an oral decision on the utility's application, any intervenor found eligible in that decision for a cost award must submit to the Board and to the applicant utility, its statement of costs prepared in accordance with the guidelines. The statement of costs submitted must be verified by an appropriate affidavit.

6. An intervenor must deduct from the total amount claimed, the amount of any funds received expressly for expenses related to that proceeding from other sources, such as Legal Aid or membership contributions.

7. Within 10 working days of receipt of such statement of costs, the applicant utility must file any objections with the Board in writing with a copy provided to that intervenor.

8. Board Solicitor or authorized Board official will act as Taxing Officer and will consider the statement of costs and submissions and, if necessary, require further supporting documentation or reply from the intervenor to determine whether or not the expenses are reasonable. If deemed necessary by the Taxing Officer, he may hold a brief oral inquiry to determine the quantum of costs.

9. The Taxing Officer will then make a recommendation to the Board panel that heard the utility's application and will provide copies of it to both the applicant and intervenor. The recommendation will include reasons if the statement of costs has been opposed by the applicant utility.

10. An objection to a recommendation of the Taxing Officer may be submitted to the same Board panel within 10 working days of the date of the Taxing Officer's recommendation and a hearing may be held for that

purpose if requested by the applicant or intervenor, or if required by the Board.

11. The Board will issue a cost order fixing the quantum of costs to be awarded to each eligible intervenor when:

i) the 10 day objection period has expired, there has been no objection, and the Board panel has accepted the Taxing Officer's recommendation; or

ii) in the absence of objections, the Board panel has fixed an award other than that recommended by the Taxing Officer; or

iii) an objection has been filed and the Board panel, after taking appropriate action, has fixed the award.

DATED at Toronto on this 12th day of June, 1985.

ONTARIO ENERGY BOARD

M. C. Rounding
Marie C. Rounding
Presiding Member

Robert W. Macaulay, Q.C.
Chairman

John C. Butler
Vice-Chairman

Harvey R. Chatterson
Member

Donald H. Thornton, Q.C.
Member

Richard R. Perdue, Q.C.
Member

Denis A. Dean
Member

Appendix A

E.B.O. 116
LIST OF RESPONDENTS TO NOTICE

1. ONTARIO MUNICIPAL ELECTRIC ASSOCIATION

Fogler, Rubinoff Suite #1400 150 York Street Toronto,Ontario M5H 3T1	Mr. Alan Schwartz, Q.C. Solicitor 864-9700

2. MR. FRANK F. HUBSCHER

439 University Avenue Phoenix House Suite #1410 Toronto, Ontario M5G 1Y8	 593-7075

3. ONTARIO HYDRO

H19-D13 700 University Avenue Toronto, Ontario M5G 1X6	Dr. R.M. Yealland Public Hearings Officer 592-3723

4. ENERGY PROBE

100 College Street Toronto, Ontario M5G 1L5	Mr. David I. Poch Counsel 978-7014

5. FLOWERS CANADA

219 Silvercreek Pkwy. North Unit #9 Guelph, Ontario N1H 7K4	Mr. B.G. Wilson Executive Secretary (519) 823-2670 (519) 823-5840

6. MR. J.A. GIFFEN, Q.C.

Giffen, Pensa
478 Waterloo Street
London, Ontario
N6B 2P6 (519) 673-1910

7. CORPORATION OF THE CITY OF KITCHENER

3rd Floor, City Hall
P.O. Box 1118
Kitchener, Ontario
N2G 4G7

Mr. James Wallace
City Solicitor
(519) 885-7271

8. CANADIAN ENVIRONMENTAL LAW ASSOCIATION

243 Queen Street West
4th Floor
Toronto, Ontario
M5V 1Z4

Ms. Pauline (Toby) Vigod
Counsel
977-2410

9. THE CONSUMERS' GAS COMPANY LTD.

Aird & Berlis
145 King Street West
15th Floor
Toronto, Ontario
M5H 2J3

Mr. R.S. Paddon, Q.C.
Solicitor
364-1241

10. MRS. IRENE MOONEY

371 Division Street
Kingston, Ontario
K7K 4A6 (613) 542-9474

11. CYANAMID CANADA INC.

2255 Sheppard Avenue East
Willowdale, Ontario
M2J 4Y5

Mr. J.D. Day
General Manager
Plant Food Division - Canada
498-9405

12. INCO LIMITED

Borden & Elliot 250 University Avenue Toronto, Ontario M5H 3E9	Mr. K.W. Scott, Q.C. Counsel 593-5511

13. ASSOCIATION OF MAJOR POWER CONSUMERS IN ONTARIO (AMPCO)

200 Ronson Drive Suite #104 Rexdale, Ontario M9W 5Z9	Mr. Jeffrey L. Davies Solicitor 243-3302

14. INDUSTRIAL GAS USERS ASSOCIATION (IGUA)

Scott & Aylen 170 Laurier Avenue West Ottawa, Ontario K1P 5V5	Mr. P.C.P. Thompson, Q.C. Solicitor (613) 237-5160

15. FEDERATION OF NORTHERN ONTARIO MUNICIPALITIES

Lang, Michener, Cranston, Farquharson & Wright P.O. Box 10 1 First Canadian Place Toronto, Ontario M5X 1A2	Mr. J.E. Johnson Counsel 360-8600

16. UNION GAS LIMITED

Blake, Cassels & Graydon P.O. Box 25 Commerce Court West M5L 1A9	Mr. B. H. Kellock, Q.C. Mr. John L. Ronson Counsel 863-2691

17. ONTARIO FEDERATION OF AGRICULTURE

491 Eglinton Avenue West Toronto, Ontario M5N 3A2	Mr. Dale Ferns Environmental Analyst 485-3333

18. NEW DEMOCRATIC PARTY CAUCUS

Room 212A
North Wing
Legislative Buildings
Queen's Park
Toronto, Ontario
M7A 1A2

Mr. Donald MacDonald
Chairman

965-5948

19. CONSUMERS' ASSOCIATION OF CANADA (ONTARIO)

234 Eglinton Avenue East
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Mrs. Elaine Stefani
President

481-6864

20. NORTHERN & CENTRAL GAS CORPORATION LIMITED

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M2J 1R1

Mr. George Laidlaw

491-1880

21. INTER-CITY GAS CORPORATION

Thompson, Dorfman, Sweatman
500 Bank of Canada Building
3 Lombard Place
Winnipeg, Manitoba
R3B 1N4

Mr. J.D. Brett

(204) 934-2442

22. CONSUMERS FIGHT BACK

53 Queen Street
Suite #44
Ottawa, Ontario
K1P 5C5

Mr. Max Wolpert

(613) 563-0734

23. NORTH YORK HYDRO

5800 Yonge Street
North York, Ontario
M2M 3T3

Mr. A. Stuart C. Wilson
Legal Counsel
229-5114

24. UNION HALL ACTION COMMITTEE

334 MacLaren Street
Ottawa, Ontario
K2P 0M4

Mr. Peter J. Usher
Chairman
(613) 233-6259

25. NO TOWERS FEDERATION

P.O. Box 153
Elgin, Ontario
KOG 1E0

Mr. David Ambrose
Chairman
R.R. #3, Elgin, Ontario
(613) 359-5050

Appendix B

SUGGESTED BIBLIOGRAPHY OF COSTS ARTICLES & JURISPRUDENCE

This bibliography has been compiled in order to assist participants. It is not all inclusive and not required reading. For the convenience of the participants, copies of the relevant excerpts of these publications are available for reference in a reading room at the Ontario Energy Board.

GENERAL LITERATURE

Commons, House of	Report of Special Committee on Regulatory Reform, December 1980
Consumers' Association of Canada	Cost Awards in Regulatory Proceedings: A Manual for Public Participants, October 1979
Cramton, Roger	"The Why, Where and How of Broadened Public Participation in the Administrative Process", Georgetown Law Journal (1972) Vol.60, #3, p.525
Economic Council of Canada	Reforming Regulation, 1981, esp. Chapter 12
	Public Participation in the Regulatory Process: The Issue of Funding; Working Paper #17, K.G. Englehart, February 1981.

Fox, David	Public Participation in the Administrative Process, Law Reform Commission of Canada Study Paper, Ottawa, 1979, esp. Chapter VI
Gellhorn, Ernest	"Public Participation in Administrative Proceedings" (1972) 81 Yale L.J. 359 at 388-398
Gilmour, Jeffrey G.	Intervenor Costs Before Public Utility Tribunals, CAMPUT Annual Meeting, September 1983, St. John's, Newfoundland
Janisch, Hudson N.	"Administrative Tribunals in the 80's, Rights of Access by Groups and Individuals", 1981 Windsor Yearbook of Access to Justice, Vol. #1. p.303
Jordan, Ellen R.	"The Administrative Procedure Act's "Good Cause" Exemption", (1984) 36, Admin. Law Review 113
Kane, T. Gregory	Consumers and the Regulators - Intervention in the Federal Regulatory Process, Institute for Research on Public Policy, 1980, esp. Chapter 6
Law Reform Commission of Canada	Independent Administrative Agencies; Working Paper #25, Administrative Law Section, esp. Chapter 5

Lazarus, Simon & Onek, Joseph	"The Regulators and the People", 57 Virginia Law Review 1069, pp 1094 - 1106, (1971)
McCallum, Sandra K. & Watkins, Gaylor	"Citizens' Costs Before Administrative Tribunals", Chitty's Law Journal, Vol. 23, No. 6, 1975
Public Advocacy Interest Centre	Brief to The Royal Commission on the Economic Union and Development Prospects for Canada (MacDonald Commission) 1984
Roman, Andrew J.	"Training for More Effective Public Participation: The Case of the Cluff Lake Hearings" - Chapter in Involvement and Environment - Proceedings of the Canadian Conference on Public Participation, Volume 2, October, 1977
Trebilcock, Michael J.	"Regulators and the Consumer Interest: The Canadian Transport Commission's Costs Decision", (1978) 2 Can. Bus. L.J. 101-113

JURISPRUDENCE

(1) Courts

Re Green, Michaels & Associates Ltd. et al and Public Utilities Board (1979) 94 D.L.R. (3d) 641 (Alta C.A.)

Re Bell Canada and CRTC (1983) 147 D.L.R. (3d) 37 (F.C.A.), (1983) 48 N.R. 197

Manitoba Society of Seniors Inc. v. Greater Winnipeg Gas Society, Man. C.A., November 4, 1982, Suit No. 242/82

(2) Tribunals

(a) Ontario Energy Board

E.B.R.O. 395 - November 1, 1983
Consumers' Gas - Main Rates Case - Reasons for Decision

E.B.R.O. 386-I January 26, 1983
Consumers' Gas - Main Rates Case - Phase I - Reasons for Decision

E.B.O. 64 (1) & (2) July 16, 1982
Bentpath Pool Landowners - Determination of Compensation - Reasons for Decision

E.B.R.O. 364-II July 18, 1980
Northern & Central - Main Rates Case, Phase II - Reasons for Decision

H.R. 5 - December 20, 1979
Ontario Hydro - Costing & Pricing Methodology - Report to Minister of Energy

E.B.R.O. 364-II-A - April 27, 1979
Northern & Central - Motion for Directions - Main Rates Case, Phase II - Reasons for Decision

E.B.R.O. 364-I - February 28, 1979
Northern & Central - Main Rates Case, Phase I - Reasons for Decision

E.B.R.O. 367-I - July 7, 1978
Union Gas - Main Rates Case, Phase I - Reasons for Decision

E.B.R.O. 314-II - November 24, 1977
Northern & Central - Main Rates Case, Phase II - Reasons for Decision

H.R. 5-I-A - July 26, 1977
Ontario Hydro - Costing and Pricing Methodology - Motion by AMPCO for Minister of Energy to Retract Certain Portions of Letter of Reference - Reasons for Decision

E.B.R.O. 314-I-22 - April 14, 1977
Northern & Central - Costs Hearing re Main Rates Case, Phase I - Reasons For Decision

E.B.R.O. 314-II-12 - April 15, 1976
Northern & Central - Extension of Interim Rates - Reasons for Decision

H.R. 2 - August 30, 1974
Ontario Hydro - 1975 Bulk Power Rates - Report to Minister of Energy

(b) Canadian Transport Commission

Report of Canadian Transport Commission regarding awarding of costs to parties and intervenors, adopted March 15, 1976

(c) Canadian Radio-Television and Telecommunications Commission

CRTC Telecommunications Rules of Procedure - SOR/79-554, July 27, 1979

Telecom Decision CRTC 83-11 - July 28, 1983
Bell Canada, General Increase in Rates - Appeal of Taxation Order 1982-1

Telecom Costs Order CRTC 82-12 - September 21, 1982
Bell Canada, General Increase in Rates, Telecom Decision CRTC 80-14

Telecom Costs Orders CRTC 82-10 - May 27, 1982 and CRTC 82-11 - September 21, 1982
Terra Nova Telecommunications Inc. - General Increase in Rates, Telecom Decision CRTC 81-20

Telecom Costs Order CRTC 82-5 - January 28, 1982
CNCP Telecommunications, General Increase in Rates, Telecom Decision CRTC 81-26

Telecom Costs Orders CRTC 82-1 to 82-4 - January 28, 1982
Bell Canada, General Increase in Rates, Telecom Decision CRTC 81-15

Telecom Decision CRTC 81-11 - May 28, 1981
Collins Inc. et al v. Bell Canada: Application for Costs

Taxation Order - 1981-1 - May 21, 1981
Bell Canada, 1980 Increase in Rates

Telecom Decision CRTC 81-8 - May 8, 1981
National Anti-Poverty Organization, Application to Review that Part of Telecom Decision CRTC 79-17 Dealing with the Disposition of an Application for Costs Submitted by NAPO

Telecom Decision CRTC 81-5 - March 9, 1981
Bell Canada, Increase in Rates - Appeal of Taxation Order 1980-1

Taxation Order 1980-2 - July 21, 1980
Consumers' Association of Canada v. CNCP Telecommunications

Taxation Order 1980-1 - February 19, 1980
Bell Canada, Increase in Rates, Telecom Decision CRTC 78-7

Telecom Decision CRTC 80-1 - January 4, 1980
The Consumers' Association of Canada and the Wa-Wa-Ta Native Communications Society, Requests to Review that Part of Telecom Decision CRTC 78-7 Dealing with Awards of Costs

Telecom Decision CRTC 79-18 - October 5, 1979
Challenge Communications Ltd. v. Bell Canada - Appeal of Taxation Order 1978-1

Telecom Decision CRTC 79-17 - September 18, 1979
British Columbia Telephone Company, Proposed Acquisition of GTE Automatic Electric (Canada) Ltd. and of Microtel Pacific Research Limited

Telecom Order CRTC 79-297 - July 20, 1979
Rules of Procedure of the CRTC in Regard to Telecommunications Proceedings

Telecom Decision CRTC 79-7 - April 12, 1979
CNCP Telecommunications, Increase in Rates

Telecom Decision CRTC 79-5 - March 8, 1979
Bell Canada and B.C. Telephone Company, Taxation of Costs in Trans-Canada Telephone System Proceeding

Taxation Order 1979-1 - March 2, 1979
CN Telecommunications v. Newfoundland and Labrador Federation of Municipalities

Taxation Order 1978-1 - October 23, 1978
Challenge Communications Ltd. v. Bell Canada

Telecom Decision CRTC 78-7 - August 10, 1978
Bell Canada, Increase in Rates

Telecom Decision CRTC 78-5 - July 5, 1978
CN Telecommunications, Increase in Telephone Rates in Newfoundland

Telecom Decision CRTC 78-4 - May 23, 1978
CRTC Procedures and Practices in Telecommunications Regulation

Press Release - May 23, 1978
Regarding Major Changes in the Procedures and Practices Used in Regulating Telephone and Telegraph Companies Under its Jurisdiction

Telecom Decision CRTC 77-16 - December 23, 1977
Challenge Communications Ltd. v. Bell Canada

(d) Alberta Public Utilities Board

Position Paper - Interventions and Costs - February 24, 1977

Guidelines - Rate Hearing Costs, December 23, 1975

Decision No. E84061 - April 12, 1984
Determination and Fixing of the Amount of the Intervenors' Costs to be Paid by Northwestern Utilities Limited

Order No. E84056 - March 30, 1984
Order with Respect to Intervenors' Costs to be Paid by TransAlta, Alberta Power and Edmonton Power

Order No. E83166 - December 23, 1983
Order with Respect to Intervenors' Costs to be Paid by TransAlta

Decision No. E83079 - June 13, 1983
Determination and Fixing the Amount of the Intervenors' Costs to be Paid by Alberta Power Limited

Decision No. E82221 - November 4, 1982
Determination and Fixing the Amount of the Intervenors' Costs to be Paid by Canadian Western Natural Gas Company Limited

Decision No. E82143 - July 16, 1982
Alberta Government Telephones - Phase II Costs - Determination and Fixing of the Amount of the Intervenors' Costs to be Paid by Alberta Government Telephones

Decision No. E82109 - July 15, 1982
Alberta Government Telephones - Determination and Fixing of the Amount of the Intervenors' Costs to be Paid by Alberta Government Telephones

Decision No. E82134 - June 22, 1982
Approval of Payment of Certain Costs Related to Rate Application by Northwestern Utilities Limited

Order No. E81215 - October 27, 1981
Ordering of Payment of Intervenor Costs of TransAlta Utilities Corporation

Decision No. E81004 - January 9, 1981
Alberta Government Telephones-Phase I Costs - Approval of the Payment of Certain Costs

(e) Alberta Energy Resources Conservation Board

Guidelines Respecting Applications for Local Intervenors Costs Awards, December, 1982

(f) Manitoba Public Utilities Board

Order No. 53/84 - April 4, 1984
Guidelines Concerning the Awarding of Costs to Intervenors

Order No. 146/83 - June 24, 1983
Decision regarding Greater Winnipeg Gas Company Rate Application

(g) Joint Board Under the Consolidated Hearings Act

File No. CH-81-10 - November 28, 1983
Reasons for Decision and Decision - County of Northumberland Landfill Site

File No. CH-82-09 and CH-82-09(A) - October 18, 1983
Decision - Proposed Energy from Waste Facility - Victoria Hospital, London, Ontario

File No. CH-82-09 and CH-82-09(A) - August 30, 1983
Reasons for Decision - Proposed Energy from Waste Facility - Victoria Hospital, London, Ontario

File No. CH-81-05 - December 22, 1982
Reasons for Decision and Decision - County of Oxford Landfill Site

File No. CH-81-01 - November 8, 1982
Reasons for Order and Order for Costs - Ontario Hydro Eastern Ontario Transmission System Expansion Plan Stage

File No. CH-81-04 - September 23, 1982
Reasons for Order and Order for Costs - Ontario Hydro Southwestern Ontario Transmission System Expansion Plan Stage

File No. CH-81-01 - August 6, 1982
Reasons for Decision - Ontario Hydro Eastern Ontario Transmission System Expansion Plan Stage

File No. CH-81-04 - June 18, 1982
Reasons for Decision - Ontario Hydro Southwestern Ontario Transmission System Expansion Plan Stage

File No. CH-81-04 - December 16, 1981
Interim Order - Ontario Hydro Southwestern Ontario Transmission System Expansion Plan Stage

File No. CH-81-01 - November 25, 1981
Interim Order - Ontario Hydro Eastern Ontario Transmission System Expansion Plan Stage

(h) Ontario Municipal Board

The Planning Act, 1982 - New Wine, Old Bottle
January 25, 1983 - Remarks relating to Costs at the Ontario Municipal Board, Beaman, Roger T.

Appendix C

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Appendix D

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8.	NORTH YORK HYDRO	Mr. A.S.C. Wilson, Legal Counsel Mr. D.K. White, Retired General Manager
9.	NORTHERN AND CENTRAL GAS CORPORATION LIMITED	Mr. George Laidlaw, Counsel Mr. Harold Andrews, Vice-President, Finance and Regulatory Affairs
10.	ONTARIO NEW DEMOCRATIC PARTY CAUCUS	Mr. Donald C. MacDonald, Chairman
11.	CONSUMERS' ASSOCIATION OF CANADA (ONTARIO)	Mr. Bruce Willson, Resource Person

12.	ASSOCIATION OF MAJOR POWER CONSUMERS IN ONTARIO	Mr. Jeffrey L. Davies, Counsel
13.	FRANK F. HUBSCHER	Mr. Frank F. Hubscher
14.	THE CONSUMERS' GAS COMPANY LTD.	Mr. R. S. Paddon, Q.C. Counsel Mr. J. L. Aiken, Senior Vice-President, Accounting and Regulation
15.	FLOWERS CANADA	Mr. Brian Wilson, Executive Secretary of Flowers Canada
16.	ENERGY PROBE	Mr. David Poch, Counsel
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